83-697

No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, *et al.*,
Petitioners,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether it is contrary to this Court's decisions in *Motor Vehicle Mfgrs. Assn. v. State Farm Mutual*, —— U.S. ——, 51 U.S.L.W. 4935 and *BankAmerica Corp. v. United States*, —— U.S. ——, 51 U.S.L.W 4685 for a Court of Appeals to accord extreme deference to an administrator who overturns longstanding regulations that construe quite specific statutory directives adopted contemporaneously with the enactment of the enabling statute and repeatedly reviewed and reaffirmed since and who does so without showing that the prior regulations wrongly construe the statute or have proved defective in operation?

2. Whether the regulations challenged here, whose stated justification is cost savings to Government, and which attain that objective by undermining the minimum wages of workers on federal construction projects, are contrary to the Davis-Bacon Act whose purpose is to ensure fair wages for construction workers even where paying such wages may tend to increase short term construction costs?

PARTIES TO THE PROCEEDINGS BELOW

Building and Constuction Trades Department, AFL-CIO;

American Federation of Labor and Congress of Industrial Organizations (AFL-CIO);

Laborers' International Union of North America, AFL-CIO;

International Association of Heat and Frost Insulators and Asbestos Workers, AFL-CIO;

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO;

International Union of Bricklayers and Allied Craftsmen, AFL-CIO;

United Brotherhood of Carpenters and Joiners of America, AFL-CIO;

International Brotherhood of Electrical Workers, AFL-CIO;

International Union of Elevator Constructors, AFL-CIO;

International Union of Operating Engineers, AFL-CIO;

International Association of Bridge, Structural and Ornamental Iron Workers, AFL-CIO;

Tile, Marble, Terrazzo Finishers and Shopmen International Union, AFL-CIO;

International Union of Painters and Allied Trades, AFL-CIO;

Operative Plasterers' and Cement Masons' International Association of the United States and Canada, AFL-CIO;

United Union of Roofers, Waterproofers and Allied Workers, AFL-CIO;

Sheet Metal Workers' International Association, AFL-CIO;

United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO; and

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America;

Raymond J. Donovan,
Secretary of Labor;

Robert B. Collyer,
Deputy Secretary of Labor for Employment Standards; and
William M. Otter,
Administrator of the Wage and Hour Division,
United States Department of Labor.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, Building and Construction Trades Department, AFL-CIO, *et al.*, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in the above-titled case.

OPINIONS BELOW

The opinions of the United States District Court for the District of Columbia are reported at 543 F. Supp. 1282 and 553 F. Supp. 352 and are reproduced in the separately bound Appendix to this Petition at 49a and 68a. The opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit is reported at 712 F.2d 611 and is reproduced in the Appendix at 1a.

JURISDICTION

The Court of Appeals' judgment was rendered on July 5, 1983. A Petition for Rehearing and a Petition for Rehearing *en banc* were denied by the Court of Appeals on

September 16, 1983. The Order denying the Petitions for Rehearing and for Rehearing *en banc* are reproduced at 46a and 47a. On October 4, 1983, the Court of Appeals issued an Order for stay of the issuance of the mandate until October 26, 1983 that also is reproduced at 48a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The statutory provision involved in this case is § 1(a) of the Davis-Bacon Act, 40 U.S.C. § 276a, as amended. This provision is set forth immediately below.

STATEMENT OF THE CASE

Section 1(a) of the Davis-Bacon Act, ch. 411, § 1, 46 Stat. 1494, as amended, 40 U.S.C. § 276a, provides, in pertinent part, that:

> (a) The advertised specifications for every contract in excess of $2,000, to which the United States . . . is a party, for construction, alteration, and/or repair, . . . of public buildings or public works of the United States . . . and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State, in which the work is to be performed . . . .

And the Act goes on to provide that a contract based upon these specifications must contain a stipulation that the contractor shall pay wages not less than those stated in the contract specifications.

By the Act of March 23, 1941, 55 Stat. 53, and the Act of August 21, 1941, 55 Stat. 664, 40 U.S.C. § 276a-7, the foregoing requirements also apply to negotiated construction contracts of the same character. Moreover, the Davis-Bacon Act's requirements are incorporated into a number of other federal statutes covering federally financed construction. A list of these "related statutes" is contained in 29 C.F.R. § 5.1(a) (1981). *See also*, Reorganization Plan No. 14 of 1950, 15 Fed. Reg. 376 (May 24, 1950), 64 Stat. 1267, 5 U.S.C. App. 242.

The regulatory proceeding that led to the instant case began on December 28, 1979, when Secretary of Labor Ray Marshall published two related proposals in 44 Fed. Reg. 77026: the first to make certain revisions to 29 C.F.R. Part 1, *Procedures for Predetermination of Wage Rates Under the Davis-Bacon and Related Acts*; and the second to make certain revisions to 29 C.F.R. Part 5, *Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction.*[1]

As an outgrowth of those notices, "final regulations" were published in 46 Fed. Reg. 4306 and 46 Fed. Reg. 4380 (Jan. 16, 1981), with a scheduled effective date of

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[1] That rulemaking proceeding concerned not only the Davis-Bacon Act but also the Copeland Anti-Kickback Act, ch. 482, § 2, 48 Stat. 948, as amended, 40 U.S.C. § 276c, which provides:

> The Secretary of Labor shall make reasonable regulations for contractors and subcontractors engaged in the construction, prosecution, completion or repair of public buildings, public works or buildings or works financed in whole or in part by loans or grants from the United States, including a provision that each contractor and subcontractor shall furnish weekly a statement with respect to the wages paid each employee during the preceding week. Section 1001 of Title 18 shall apply to such statements.

The sole Copeland Act issue resulting from the rulemaking raised in this suit was decided in the Unions' favor both by the District Court and by the Court of Appeals and is therefore not treated at length in this petition.

February 17, 1981. However, pursuant to President Reagan's Memorandum to the Heads of All Agencies of January 29, 1981, the Secretary of Labor published a notice in 46 Fed. Reg. 11253 (Feb. 6, 1981) delaying implementation of these regulations until March 30, 1981. Then Secretary of Labor Raymond J. Donovan four times delayed the implementation of the regulations to allow reconsideration pursuant to Executive Order 12291, 46 Fed. Reg. 13193. *See*, 46 Fed. Reg. 18973 (March 27, 1981); 46 Fed. Reg. 23739 (April 28, 1981); 46 Fed. Reg. 33514 (June 30, 1981); and 46 Fed. Reg. 36140 (May 14, 1981).

On August 14, 1981, Secretary of Labor Donovan published new proposed Parts 1 and 5 in the Federal Register for comment (46 Fed. Reg. 41444 and 46 Fed. Reg. 41456), and the previously published regulations were further postponed (46 Fed. Reg. 41043). The new proposals differed substantially from both the then-current regulations and from the January 16, 1981 "final regulations" and in every instance the charge *decreased* the wage protections afforded to construction workers.

Finally, on May 28, 1982, the Secretary of Labor issued final regulations to be codified in 29 C.F.R. Parts 1 and 5 which were to become effective on July 27, 1982. This action challenging the validity of portions of these regulations (hereafter "the challenged regulations") was thereupon filed by the Building and Construction Trades Department, AFL-CIO, the AFL-CIO, fifteen national and international unions affiliated with the latter organizations and the Teamsters Union (hereafter "the Unions") against the Secretary of Labor (hereafter "the Secretary"), the Deputy Under Secretary of Labor for Employment Standards and the Administrator of the Department of Labor's Wage and Hour Division as defendants. The suit sought to overturn the portions of the challenged regulations that:

> would alter the present regulatory scheme by (1) eliminating the so-called "thirty-percent rule" by which a locally prevailing rate could be set at the rate paid to a thirty-percent plurality of local workers; (2) combining data from adjacent rural counties but excluding any nearby urban counties when wage data in a given rural county is insufficient to determine a locally prevailing wage; (3) excluding from the prevailing-wage calculation for most building projects wages paid on similar local projects that were subject to the Davis-Bacon Act; (4) expanding the permitted use of semiskilled helpers in a number of ways including permitting such a classification in areas where it is only an "identifiable" practice rather than a "prevailing" one and eliminating the requirement that helpers may do only tasks distinct from those undertaken by other classes of workers; and (5) allowing contractors to submit a weekly statement certifying compliance with Davis-Bacon wage requirements, instead of requiring the submission of the actual weekly payrolls. [Pet. App. 6a.]

The Unions promptly filed motions for a temporary restraining order, a preliminary injunction, and summary judgment and the Secretary filed a cross-motion for summary judgment.

On July 22, 1982, the District Court issued a preliminary injunction restraining the enforcement of the challenged regulations, pending final disposition of the cross motions for summary judgment. Subsequently, the District Court granted the Unions' motion for summary judgment with one exception—that court ruled that the definition of "prevailing wage" to be codified in 29 C.F.R. § 1.2(a)(1) is in accord with law. Pet. App. 68a.

On appeal the Court of Appeals affirmed the District Court on the Copeland Act "reporting" issue and on the "prevailing wage" definition issue, affirmed the District Court in part and reversed in part on the "helpers" issue

and reversed the District Court on the "Davis-Bacon projects" issue and on the "rural wage determination" issue. Pet. App. 44a. Overall, then, after the Court of Appeals' decision, three of the five challenged regulations had been upheld in full and one more upheld in substantial part.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS APPLIED THE WRONG LEGAL STANDARD IN PASSING ON THE VALIDITY OF A RADICAL CHANGE IN ADMINISTRATIVE COURSE.

The maturation of the system of federal administrative law put in place in the 1930's is bringing to the fore the question of the proper legal standard for judicial review of attempts by administrators to reverse well-settled rules. Indeed, in many areas of administrative law, the reconsideration of regulations is as common as replacing new regulatory initiatives. Such reconsiderations pose a substantial threat to the rule of law. It is the accepted postulate of our legal system that administrators are not to make law but rather to implement the law Congress has made in the enabling statute. And, all other things being equal, radical changes in longstanding regulations, particularly those issued contemporaneously with the statute's passage, and frequently reviewed and reapproved since, are particularly likely to be instances of forbidden administrative law making. Moreover, the justified suspicion that the administrator is seeking to substitute his values for the values Congress wrote into the statute is accentuated if the new regulation is not supported by a fully reasoned explanation or if the explanatory materials show that the administrator's premises are not the statute's premises. But all other things may not be equal. The enabling statute may leave large areas of discretion and contemplate a continual process of adaptation to new circumstances or a careful restudy

may persuade that the original regulation is unsound when measured against the statute or has proved defective in operation as a means of carrying out the statute. Precisely for these reasons, the process of reconsidering longstanding regulations is a particularly delicate one for the administrator and for the courts in reviewing the administrator's actions.

This case presents the important and recurring legal questions generated by such reconsiderations in a particularly clear-cut fashion. And, the approaches taken by two such able jurists as District Judge Harold Greene and Senior Circuit Judge Carl McGowan are polar opposites. Moreover, the approach of the Court of Appeals —the federal court with the heaviest administrative law docket—is contrary to the approach mandated by this Court in two decisions issued contemporaneously with the decision below. Finally, the Court of Appeals' view that the judiciary is to show extreme deference to administrators who seek to substantially alter settled rules as to what a statute means without explaining why those rules are mistaken and are not to give substantial weight to the prior administrator's understanding of the statute invites the kind of ill-considered changes that occurred here and that can only bring administrative law into disrepute.

Of equal importance, the result of the Court of Appeals' error is to undermine the protections of the Davis-Bacon Act, one of the first federal labor standards statutes in the United States Code, which has served as the model for the Walsh-Healey Act, 41 U.S.C. § 35 *et seq.* (1936) (which sets labor standards on federal supply and manufacturing contracts), for the Service Contract Act, 41 U.S.C. § 351 *et seq.* (1965) (which sets labor standards for federal service contracts), and for some forty state "little Davis-Bacon acts." Moreover, as we noted at the outset, Congress has incorporated the Davis-Bacon Act into some sixty other federal laws funding construction in almost every American community

for schools, hospitals, highways, mass transportation, libraries, water systems and housing, the most recent of which is the Federal-Aid Highway Act of 1982. This statutory complex establishes the minimum labor standards of workers employed in a substantial segment of the nation's largest industry—construction. In 1982, the total dollar volume of construction covered by the Davis-Bacon Act was approximately $30 billion. Regulatory Impact Analysis, 47 Fed. Reg. 23648-51 and 23661-64. In 1980, the Department of Labor issued 1412 wage determinations and 13,311 project determinations (*id.*), setting the labor standards for 758,000 to 1 million workers (*id.* at 23663). At stake here, therefore, is the continued vitality of a fifty year old law which affects up to a million workers annually and which is a critical component in an important segment of the economy.

Given the nature of the Court of Appeals' error and the adverse effects of that error on the proper functioning of the administrative process generally and on the proper implementation of the Davis-Bacon Act in particular, this is a classic case of a decision of a federal question in a way that is in conflict with applicable decisions of this Court that calls for the grant of a writ of certiorari.

(a) *The District Court's Approach*

The District Court, in carrying out the "judicial function" of assuring that "[a]dministrative determinations must have a basis in law and must be within the granted authority" (*Social Security Board v. Nierotko*, 327 U.S. 358, 369 (1946), proceeded from the premise that the regulations challenged here "are essentially exercises in statutory construction" of specific Congressional directives and not "exercises of broad public interest-type discretion." Pet. App. 62a. Moreover, the District Court found that in "every significant respect" the challenged regulations are inconsistent with an "[a]dministrative construction that was contemporaneous with the adoption of the Davis-Bacon Act" issued "by the administrators" who "knew best what Congress intended" and that the regulations

have "stood without substantial alteration" from 1935 to 1983. Pet. App. 61a.

Against that background, the District Court paid special attention to the present Secretary's reasons for the challenged regulations. And that court concluded both that the Secretary had failed to show that the "earlier understanding of the statute was wrong or that experience has proved it to be defective" and that the Secretary had relied on a "cost-savings" to the Government justification even though the Act is one in which "the wage floor philosophy prevailed over that which required low cost to the government as the prime consideration." Pet. App. 64a.

The District Court accorded substantial weight to contemporaneous administrative practice on the recognition that such practice is a uniquely informative guide to statutory construction. As Justice Cardozo put the point in *Norwegian Nitrogen v. United States*, 288 U.S. 294, 315 (1933):

> . . . [Administrative] practice has peculiar weight when it involves a contemporaneous construction by the men charged with the responsibility of setting [statutory] machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.

And the District Court took into account, too, that:

> [F]or forty-seven years thereafter, through the administrations of eight Presidents and fifteen Secretaries of Labor of many political and ideological persuasions, those [contemporaneous] interpretations and those regulations stood without substantive alteration. During that period none of the administrators effected the kinds of fundamental changes that are brought about by the regulations adopted two months ago; instead, the various Secretaries of Labor continued to interpret and enforce the laws precisely in accordance with the original understanding. Nor can this stability and consistency in construction by those charged with the laws' enforcement be attributed to inattention, oversight, or neglect (as is some-

> times true when relatively obscure laws or regulations are involved). The Davis-Bacon Act is and always has been a well-known law, affecting millions of employers and wage-earners throughout the United States, and it has frequently been the subject of political and other controversy. [Pet. App. 61a.]

In sum, in the District Court's view, the rule of judicial deference to contemporaneous regulations adopted by the executive officers who are involved in the legislative process rests on a sound appreciation of those officers' unique opportunity to understand every nuance of the enabling legislation and of the legislative intent embodied in the statute's literal language. The rule of deference to long-standing administrative interpretations also rests on the unassailable logic that a regulation that is accepted by executive officers of different viewpoints and different parties and is left unchanged by a sucession of Congresses is likely to be in accordance with the enabling statute. Justice Cardozo captured the essence of this logic some years prior to his *Norwegian Nitrogen* opinion when he stated, "Not lightly vacated is the verdict of quiescent years." *Coler v. Corn Exchange Bank*, 250 N.Y. 136, 141, 164 N.E. 882, 884 (1928), *aff'd*, 280 U.S. 218 (1930).

(b) *The Court of Appeals' Approach*

The Court of Appeals' view of an administrator's responsibility in making a change of the kind at issue here and the judicial role in reviewing such a change could not have been more different. That approach is stated at the outset in the section upholding the Secretary's "prevailing wage" definition: ". . . [O]ur task is limited to ensuring that the new definition is not one 'that bears no relationship to any recognized concept of [the statutory term] or that would defeat the purpose of the [statutory] program.'" Pet. App. 10a quoting *Batterton v. Francis*, 432 U.S. 416, 428 (1977).[2] That standard of ex-

[2] *Batterton*, we note, is not in point even if it is assumed that for the purpose of judicial review, a change in a long-standing rule is

treme deference was followed throughout. Of equal importance, at no point did the Court of Appeals accord any dispositive weight to the prior regulatory record. Indeed, that court expressly "disagree[d] with the District Court's heavy reliance on [prior contrary long-standing] administrative practice . . . ." Pet. App. 15a.

(c) *This Court's Precedents*

Two decisions by this Court last Term demonstrate that the Court of Appeals' approach in this case is wrong. In *Motor Vehicle Mfgrs. Assn. v. State Farm Mutual*, —— U.S. ——, 51 U.S.L.W. 4935, 4956 (June 24, 1983), the Court stated:

> [T]he revocation of an extant regulation is substantially different than a failure to act. Revocation constitutes a reversal of the agency's former views as to

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no different than the initial promulgation of a rule. For, the delegation to the Secretary of Labor in the Davis-Bacon Act bears no relation to the all but unlimited authority of the HEW Secretary under § 407(a) of the Social Security Act, 42 U.S.C. § 607(a), as construed in *Batterton*, 432 U.S. at 417-418, 424-426. The language of 42 U.S.C. § 607(a) provides:

> (a) the term "dependent child" shall, notwithstanding section 606(a) of this title, include a needy child who meets the requirements of section 606(a)(2) of this title who has been deprived of paternal support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father, and who is living with any of the relatives specified in section 606(a)(1) of this title in a place of residence maintained by one or more of such relatives as his (or their) own home.

The critical language is that in the parenthesis: "as determined in accordance with standards prescribed by the Secretary." Congress thereby expressly authorized the HEW Secretary to establish *standards* according to which the states were to determine claimants' "unemployment" status in particular cases. No such authority to prescribe standards is contained in the provisions of the Davis-Bacon Act. Rather, Congress set the standards in the statute itself and the Secretary of Labor in determining prevailing wages must proceed in accordance with those standards just as the states must proceed in accordance with the HEW Secretary's standards in determining who is an "unemployed father."

> the proper course. A "settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to." *Atchison, T. & S.F.R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-808 (1973).

Even where the only statutory limitation on the administrator is the arbitrary and capricious standard of judicial review stated in the Administrative Procedure Act, to overcome that presumption:

> [T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a "rational connection between the facts found and the choice made." *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962).... Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view of the product of agency expertise. [51 U.S.L.W. at 4956.]

Moreover, just two weeks earlier in *BankAmerica Corp. v. United States*, —— U.S. ——, 51 U.S.L.W. 4685 (June 9, 1983), the Court had emphasized that the presumption later reaffirmed in *Motor Vehicle Mfgrs.* is far more binding when the administrative practice goes to the correct interpretation of the enabling statute and does not merely canalize administrative discretion. Because of its importance we set out the relevant portion of that opinion at some length:

> [T]he Government does not come to this case with a consistent history of enforcing or attempting to enforce Section 8 in accord with what it urges now. On the contrary, for over 60 years, the Government

made no attempt, either by filing suit or by seeking voluntary resignations, to apply Section 8 to interlocks between banks and nonbanking corporations, even though interlocking directorates between banks and insurance companies were widespread and a matter of public record throughout the period. . . . "[J]ust as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred." *FTC v. Bunte Brothers, Inc., supra,* [312 U.S. 349, 353].

* * * *

When a court reaches the same reading of the statute as the practical construction given it by the enforcing agencies over a 60 year span, that is a powerful weight supporting such reading. Here, moreover, the business community directly affected and the enforcing agencies and the Congress have read this statute the same way for 60 years. . . . While these views are not binding on this Court, the weight of informed opinion over the years strongly supports the District Court holding that Congress intended the statute to be interpreted according to its plain meaning. [51 U.S.L.W. at 4687-4688 (emphasis added)].

(d) *The Consequences of the Court of Appeals' Error*

The Court of Appeals' deferential approach which accords no dispositive weight to the prior contrary longstanding reading of the statute and requires nothing in the way of reasoned explanation of the need for a change cannot be squared with the presumption described in *Motor Vehicle Mfgrs.* and in *BankAmerica.* And that erroneous approach was decisive below since the Secretary's explanation of the challenged regulations is plainly insufficient to overcome that presumption and, in fact, by its lack of fidelity to the Davis-Bacon Act's purpose shows that the challenged regulations are not an attempt

to carry out the statutory mandate but rather an attempt to change that mandate to fit the Secretary's own view of what the statutory purpose should be.

The Secretary explained those regulations in the preamble thereto, 47 Fed. Reg. 23644-23651 and 47 Fed. Reg. 23658-23664, and in the Regulatory Impact Analysis (RIA) which was summarized in the preamble. Both focus on the *cost* aspects of the new regulations and the extent to which regulatory changes will succeed in *lowering* wage rates paid on public construction and in that fashion save money for the Federal Government. But, the basic purpose of the Davis-Bacon Act and its related statutes is to ensure fair wages and working conditions for laborers and mechanics employed on federally-funded construction, and not to save money for the Government. *United States v. Binghampton Construction Co.*, 347 U.S. 171 (1954). As the District Court recognized:

> The basic purpose of the Davis-Bacon Act is to protect the wages of construction workers even if the effect is to increase the costs of construction to the federal government. In 1931 and 1935—notwithstanding such opposition as that of President Hoover who cited a "great increase in expense to the taxpayer" as one of his principal grounds—the wage-floor philosophy prevailed over that which regarded low cost to the government as the prime consideration . . . . Under our constitutional system, policy decisions are not made by government administrators; they are made by the Congress. In this instance Congress made its decision, first in 1935 by the enactment of the Davis-Bacon Act, and then again in the forty-seven years since that time by the failure and refusal of succeeding Congresses either to change the law or to suggest that in all these years it had been improperly interpreted and applied. [543 F. Supp. at 1290-91] (footnote omitted).

Thus, the Secretary's explanation fails to provide a rationale consistent with the Act for any of the administrative changes incorporated in the challenged regulations.

In sum, the Court of Appeals, by its failure to follow this Court's directions in *Motor Vehicle Mfgrs.* and in *BankAmerica*, allowed "[t]he deference owed to an expert tribunal . . . to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress" (*American Ship Bldg. v. NLRB*, 380 U.S. 300, 318 (1965)).[3]

II. THE COURT OF APPEALS' DECISION WILL ELIMINATE THE CENTRAL WORKER PROTECTION PROVIDED BY THE DAVIS-BACON ACT—THAT WAGE DETERMINATIONS BE BASED UPON WAGES PREVAILING FOR DISCRETE CORRESPONDING "CLASSES OF LABORERS AND MECHANICS."

The most critical adverse consequence of the Court of Appeals' decision is to undermine a central component of the protections for construction workers Congress wrote into law in 1935. In that year, after extensive hearings, Congress determined that the 1931 Davis-Bacon Act was insufficient to protect those workers and, therefore, instructed the Secretary to base his wage determinations on those prevailing for "*classes of laborers and mechanics.*" That critical statutory term was understood by the 1935 Congress and has been uniformly understood by the Secretary from 1935 to 1982 to require that each such class be discrete and distinguishable. Throughout that period, it has been understood as well that a blurring of the line between "classes of laborers and mechanics" would destroy the integrity of the statutory scheme and, indeed, in practical terms would read this critical protective requirement out of the Act. The Secretary's new interpretation of "classes of laborers and mechanics"

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[3] While, as we have stressed, the District Court did follow the correct standard of judicial review, that court, we believe, misapplied that standard in upholding the challenged regulation defining the critical statutory term "prevailing wage". Thus, if the writ is granted we will seek the invalidation of all of the challenged Davis-Bacon regulations.

will, in effect, revive the very abuses of overlapping classifications which destroyed the 1931 Act as a practical protection for construction workers and which Congress intervened to correct in passing the 1935 Act.

Congress recognized in writing the Davis-Bacon Act that the construction industry work force is made up of groups of workers—denominated in the statute as "classes of laborers and mechanics"—and that wages are set separately for each separate class; and Congress' purpose in that Act was to maintain the minimum wage for *each such class*. It is inherent in the nature of things that such a statutory minimum wage scheme cannot achieve its intended purpose if employers are free to assign duties to a lower paid class that overlaps with higher paid classes. The District Court was entirely correct in holding:

> [T]he integrity of the statutory scheme requires that each 'class of laborers and mechanics' be comprised of 'members' who perform 'well-defined tasks' and do not perform traditional craft work of another, higher paid class . . . [I]n practice that distinction can be maintained only if the tasks of the helper class are defined as discrete and distinguishable from those of mechanics and laborers. . . . (Pet. App. 72a).
>
> * * * *
>
> [I]f contractors could thus assign a helper to perform the tasks of any and all classes of laborers and mechanics and they could do so at lesser pay, they would do just that, and the requirement that wages be based on "corresponding classes" will be effectively read out of the law. (Pet. App. 52a).

Nevertheless, the Court of Appeals approved the Secretary's new interpretation of "classes of laborers and mechanics" which embraces a helper who "undertakes tasks that overlap with those of higher paid journeymen and laborers" (Pet. App. 22a) and whose "essential functional distinction would not be the nature of the task

done but rather the subordinate position of the helper *vis-a-vis* a journeyman." (Pet. App. 23a).[4]

For the first time, the Secretary of Labor will be permitted to base wage determinations on duplicitous and overlapping "classes of laborers and mechanics" so that the helper "may perform any task throughout the entire construction field. . . ." Pet. App. 52a. Thus, under the new interpretation of "classes of laborers and mechanics," a helper paid at a lower rate will be allowed to perform the duties of the various classes of higher paid journeymen so long as the helper does so under the supervision of a journeyman.

We submit that the Secretary's new definition of "classes of laborers and mechanics" is: (a) plainly contrary to the statute and, indeed, revives the very classification abuses that arose under the 1931 statutory scheme and that the 1935 Congress expressly intended to eliminate; and (b) inconsistent with the Secretary's recognition from 1935 to 1982 that "classes of laborers and mechanics" must be distinct from one another and that tasks assigned to each class may carry with them but *one* wage rate.

The Secretary's decision to now abandon this long-standing interpretation of "classes of laborers and mechanics" is incorrectly characterized by the Court of Appeals as an enforcement decision as to which "our deference to his choice is properly near its greatest." Pet. App. 37a. We respectfully disagree. The issue is one of statutory interpretation. The central enforcement questions were answered by Congress in 1935 when the legislature amended the Davis-Bacon Act to put "teeth" into the prevailing wage principle.

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[4] The Court of Appeals did invalidate the Secretary of Labor's new regulation insofar as the regulation would permit the recognition of helpers where only "identifiable" in the area, rather than "prevailing," as has previously always been required. Pet. App. 26a.

The original 1931 Act simply provided that "the rate of wage for all laborers and mechanics employed by the contractor or any subcontractor . . . shall be not less than the prevailing rate of wages for *work of a similar nature* . . . ." While there was no quarrel with the prevailing wage principle in theory, its unenforceability in practice gave rise to immediate Congressional hearings. Those hearings showed that these enforcement problems existed, in part, because the 1931 Act did not include a concept of "classes of workers." Thus, in 1932, Secretary of Labor William Doaks described the types of disputes arising under the 1931 Act, emphasizing those arising:

> as to the classification of work—that is using men of a lesser classification frequently to do the work of journeymen while receiving pay as helpers or skilled laborers. [Hearings on H.R. 12 Before the House Committee on Labor, 72nd Cong., 1st Sess. at 163 (1932).]

There were additional hearings in 1932 that led to the enactment of amendments which President Hoover vetoed. Hearings on S. 3847 and H.R. 11865 Before the House Committee on Labor, 72nd Cong., 1st Sess. (1932). Then further extensive congressional hearings spurred by the same enforcement concerns followed in 1934. These too are replete with examples of the problem of improper classification under the original Act. Hearings on S. Res. 228 Before the Senate Subcommittee on Education and Labor, 73rd Cong., 2nd Sess. (1934). Following these hearings, the Senate Committee on Education and Labor issued its extensive Senate Report 332. S. Rep. 332, 74th Cong., 1st Sess. (1935). The Report described in vivid detail the "variety of matters [which] came to the attention of the Committee at the open hearings, embracing all known methods used or devices contrived to underpay labor . . . ." The Committee found that these "devices," including those of misclassification, flourished because of "defects . . . in substantive portions of the statutes." *Id.* at 5. The statutory "defects" leading to

the problem of misclassification were described clearly by the Committee:

> . . . *The act also fails to be explicit on the matter of classification, with the result that many contractors were able to circumvent the law by hiring mechanics as common laborers, and then assigning them to tasks which fell within the purview of one of the skilled crafts.* Both these points should be clarified by new legislation [(emphasis added) *Id.* at 5.]

The Report described by way of examples and by way of criticizing the classification practices under other public works statutes the nature of the evil it had found:

> . . . The revised Public Works Administration zone rates in favor of which much can be said, since they seek to take into account conditions in living and wage standards in various parts of the country, have been largely broken down by intermediate classifications of labor and *failure to retain the strict lines of demarcation intended to be drawn and maintained between skilled and unskilled labor. The whole tendency has been for wages of the skilled group to descend toward the level of the unskilled group, this by reason of intermediate classification devices.* [(emphasis added) *Id.* at 13, 16-17.]

It is clear that the Committee was expressing its understanding that when the lines between classes of workers were allowed to blur, *viz.*, if there was a failure to retain "strict lines of demarcation", then enforcement of the prevailing wage principle becomes impossible because work assignments inevitably flow down to the lower wage classification. It is in this context that the 1935 amendments added the requirement that the prevailing wage be based upon the wages paid "corresponding classes of laborers and mechanics." The Congress had found a "substantive defect in the statute" and acted to correct that defect.

The Court of Appeals refers to the addition of this language as an "unexplained change." Pet. App. 33a.

In so doing, that court disregarded the 1935 legislative materials that explain that change with great lucidity. Congress recognized and was clearly seeking a remedy for the "tendency . . . of wages of the skilled group to descend toward the level of the unskilled group and this by reason of the failure to retain the strict lines of demarcation intended to be drawn and maintained between skilled and unskilled labor." S. Rep. 332 at 13, 16-17.

And the Court of Appeals compounded its error by reaching back to a few lines of colloquy during the 1932 debates having nothing to do with the intended meaning of "classes of mechanics and laborers" and granting that colloquy controlling significance. Pet. App. 34a.[5]

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[5] The Court of Appeals relied upon a colloquy between Rep. Connery and Rep. Johnson to establish that Congress did not intend to implement a "union" classification scheme. An examination of the 22 lines of colloquy in the context of 27 pages of House debate shows it was wholly unrelated to what classification practices the Congress intended to adopt or not adopt. Rather, the colloquy was part of a description of the procedures utilized by the Secretary of Labor beginning in 1931 to ascertain the prevailing rate. An examination of the full debate shows that Rep. Connery frequently stated his familiarity with the procedures being utilized by the Secretary of Labor and explicated those procedures to his colleagues. 75 Cong. Rec. 12363-90. Thus, because there was no concept of classes of workers in the 1931 Act, any discussion between members of the 1932 Congress concerning the manner in which the Secretary of Labor was ascertaining the prevailing rate at that time can shed no light on the intended meaning of the phrase "classes of laborers and mechanics" which was not added to the Act until 1935.

Moreover, the Court of Appeals' concern with whether Congress mandated a "union classification" system does not address the pertinent issue. Rather, the question is whether Congress contemplated a statutory scheme which permits overlapping classes of workers doing the same work and receiving different wage rates or whether Congress mandated a prevailing wage system based on "strict lines of demarcation" between classes. We submit that the Congress was not concerned with whether it was sanctioning a union or non-union classification system in 1935, but did intend to establish a classification system based upon distinct and discrete classes of construction workers.

The clear message of the 1935 Act and its background—that the phrase "classes of laborers and mechanics" reflected the Congressional intention to "retain the strict lines of demarcation" between crafts—was uniformly recognized from 1935 to 1982. Charles Donahue, Solicitor of Labor from 1961 to 1965, provided a description of the origins of the principle of distinct and exclusive classes in the 1935 Act:

> The term [classes and corresponding classes of laborers and mechanics] . . . [was] not included in the original Davis-Bacon Act of March 3, 1931, which simply provided that "the rate of wage for all laborers and mechanics employed by the contractor or any subcontractor . . . shall be not less than the prevailing rate of wages for work of a similar nature . . . ." The investigation of the Walsh Committee, which contributed to the enactment of the act in its present form, disclosed that under the original act, there had been a failure to retain strict lines of demarcation between skilled and unskilled labor. As a consequence, the tendency had been for wages of the skilled group to descend toward the level of the unskilled group. As a result, the "work of a similar nature" standard was deleted, and in lieu thereof provision was made for wage determinations for "classes" of laborers and mechanics from the locally prevailing wages paid "corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work. Donahue, *The Davis-Bacon Act and the Walsh-Healey Public Contracts Act: A Comparison of Coverage and Minimum Wage Provisions*, 29 Law and Contemporary Problems 488, 508 (1964), cited at Pet. App. 35a.

Successive Department of Labor administrators and the Comptroller General have repeatedly reaffirmed that even where prevailing in the area, a helper may not be recognized unless "exclusive" work differences exist between helpers and other classes:

> We do not think, however, that the Davis-Bacon Act authorizes the imposition of work classifications on the sole basis that a local practice does exist. Unless local practices clearly establish actual differences in work classifications, or *unless they are exclusive*, it seems clear that this adoption in the designation of classifications is neither required nor permitted by the terms of the Davis-Bacon Act. (emphasis added) Comptroller General Opinion No. B-147847 (December 17, 1964).

The principle that the same work does not belong in two wage rate classifications has not been confined to helpers alone. The Department of Labor also examines classes of skilled workers to determine that their tasks are not overlapping. *In re Brezina Construction Company*, WAB No. 68-10 (1969).

In sum, because the proper interpretation of the term "classes of laborers and mechanics" is so central to the statutory scheme; because as shown above the Secretary's new reading of that term is contrary to the Act's purpose of protecting construction workers; because the Court of Appeals' opinion rests on the unduly restrictive standard of review and a failure to accord proper weight to the 1935 legislative history and the uniform practice from 1935 to 1982; and because these errors all but remove a limitation on the Secretary the 1935 Congress deemed critical to provide, we submit that the decision of the Court of Appeals should not be permitted to stand.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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83-697

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, *et al.*,

Petitioners,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, *et al.*,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1118

BUILDING & CONSTRUCTION TRADES' DEPARTMENT, AFL-CIO, *et al.*

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, *et al.*,
Appellants

No. 83-1157

BUILDING & CONSTRUCTION TRADES' DEPARTMENT, AFL-CIO, *et al.*,
Appellants

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, *et al.*

Appeals from the United States District Court
for the District of Columbia
(D.C. Civil No. 82-01631)

Argued May 6, 1983

Decided July 5, 1983

J. Paul McGrath, Assistant Attorney General, with whom *Stanley S. Harris*, United States Attorney, *Carolyn B. Kuhl*, Deputy Assistant Attorney General, *Robert E. Kopp*, *Anthony J. Steinmeyer*, *Frank A. Rosenfeld*, Attorneys, Department of Justice, and *Karen I. Ward*, Associate Solicitor, Department of Labor, were on the brief, for appellants/cross-appellees.

Lawrence Gold and *Terry R. Yellig*, with whom *Lawrence J. Cohen* and *Robert J. Connerton* were on the brief, for appellees/cross-appellants. *Linda Lipsett* also entered an appearance for appellee in 83-1118.

Thomas S. Martin was on the brief for Associated Builders and Contractors, Inc., amicus curiae urging reversal in 83-1118 and affirmance in 83-1157.

G. Brockwel Heylin and *Michael E. Kennedy* were on the brief for Associated General Contractors of America, Inc., amicus curiae urging reversal in 83-1118 and affirmance in 83-1157.

Before EDWARDS, *Circuit Judge*, and MCGOWAN and MACKINNON, *Senior Circuit Judges*.

Opinion for the Court filed by *Senior Judge* MCGOWAN.

MCGOWAN, *Senior Circuit Judge*: This appeal brings before us on an expedited basis five provisions of certain final rules issued by the Secretary of Labor ("the Secretary") under the Davis-Bacon Act, 40 U.S.C. § 276a (1976), and the Copeland Anti-Kickback Act, 40 U.S.C. § 276c (1976). These statutes, essentially unchanged since their enactment or amendment in the 1930's, guarantee to workers on federal construction projects a minimum wage based on locally prevailing wage rates. Three of the new regulatory provisions of concern here would alter the method for finding the prevailing wage. Another set of regulations would allow federal contractors far greater freedom to use semiskilled helpers on projects than has previously been permitted. The Secretary as-

serts that this expanded use of helpers would better reflect the practice on private projects. The fifth provision is intended to ease the regulatory burden on federal construction contractors by reducing the detail required in their weekly submissions to the government regarding wages. All of the regulations under challenge are expected to reduce federal construction costs; the Secretary has estimated that the last two provisions alone would save the government or its contractors about $463 million per year. *See* 47 Fed. Reg. 23,657, 23,662, 23,664 (1982) (regulatory impact statement).

This action was brought by the AFL-CIO, sixteen AFL-CIO unions or departments, and the Teamsters union ("the unions"), seeking an injunction against implementation of the new regulations and a declaration that the rules are contrary to law. No claims of procedural irregularity were pressed. The District Court granted the requested relief in part. We affirm in part and reverse in part. We uphold all of the new regulations as within the broad administrative discretion contemplated by Congress, except for (1) the provision simplifying submissions of wage data to the government, which we find to be inconsistent with the language and purpose of the statutory command that the submissions contain wage data as to "each employee," and (2) part of the expanded permission to use helpers, which part we find similarly contrary to statutory language and purpose.

I

As noted, the Davis-Bacon Act was enacted during the Great Depression to ensure that workers on federal construction projects would be paid the wages prevailing in the area of construction. The evil sought to be remedied was that, with the precise specifications set out in federal contracts and the increasing standardization of building-material prices, the low-bidding contractor on a federal job was generally the one who paid the lowest

wages. *See generally* S. REP. NO. 332, 74th Cong., 1st Sess. pt. 2, at 4 (1935) ("variations between bids submitted by competing contractors are due most frequently to different estimates of labor costs"). The contractor would accomplish this by taking advantage of widespread unemployment in the construction industry and hiring workers at substandard wages, often bringing a low-paid crew in from distant areas. *Id.* at 7-8.

This practice was deemed to be a problem for two reasons. First, and apparently most important, it tended to undercut one of the purposes of the massive federal building program of the times, which was to distribute employment and federal money equally throughout the country. S. REP. NO. 1445, 71st Cong., 3d Sess. 1-2 (1931). Local contractors and workers, used to a certain wage and living standard, could not compete with the migratory labor of the winning bidder. *Id.* at 2; *see also* 74 CONG. REC. 6510 (1931) (remarks of Senator Bacon) ("I think it is a fair proposition where the Government is building these post offices and public buildings throughout the country that the local contractor and local labor may have a 'fair break' in getting the contract."); 10 Comp. Gen. 294, 295 (1931) (" 'The Government should be the last employing agency to expect or countenance the performance of its construction contracts at the sacrifice of its citizens.' ") (quoting letter from Treasury Secretary proposing administrative predecessor of Davis-Bacon Act).

Second, the lower wages led to labor strife and to broken contracts by contractors who speculated on the labor market unwisely, thus preventing "the most economical and orderly granting of Government contracts." S. REP. NO. 332, *supra*, pt. 2, at 8; *see also* 74 CONG. REC. 6510 (1931) (remarks of Rep. LaGuardia) ("the workmanship of the cheap imported labor was of course very inferior"). Nevertheless, under a ruling by the Comptroller General, federal contracting agencies could

not insist on contractors paying the prevailing wage because of the statutory requirement that federal contracts go to the lowest bidder. 10 Comp. Gen. 294, 301 (1931) (prevailing wage requirement would "remove[] from competitive bidding on the project an important element of cost and tend[] to defeat the purpose of the [low-bid] statute"). Thus, legislation was called for.

The original Davis-Bacon Act was enacted in 1931 and required that federal contractors on certain projects pay the prevailing wage in the area, as determined by the contractors. Any disputes over the contractors' determinations were to be referred to the Secretary for conclusive determination. Davis-Bacon Act, ch. 411, 41 Stat. 1494 (1931). Dissatisfaction with this arrangement surfaced quickly, however, as widespread violations and abuses were discovered. An attempt to provide for predetermination of the prevailing wage by the Secretary and penalties for failure to pay that rate was vetoed by President Hoover in 1932 as "obscure and complex and . . . impracticable of administration," 75 CONG. REC. 14,589 (1932) (veto message); *see id.* at 14,590 ("The whole design of the new . . . proposal requires an expansion of bureaucratic control over activities which now function effectively with the minimum of interference by the Government and that only when dispute arises.").

Congress had greater success in 1935. It passed wage predetermination and enforcement provisions that have remained essentially unchanged to this day. The Act now provides that the advertised specifications for every federal construction project in excess of $2,000 that requires the employment of mechanics and/or laborers

> shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character simi-

> lar to the contract work in the city, town, village, or other civil subdivision of the State, in which the work is to be performed.

40 U.S.C. § 276a(a) (1976). The construction contract must contain a stipulation requiring that the advertised wages be paid, and the applicable wages must be posted at the site. *Id.* The contracting agency is empowered to withhold payment to ensure compliance with the minimum wage requirements. *Id.*

In response to some of the abuses prevalent under the 1931 act, Congress in 1934 also passed the Copeland Anti-Kickback Act, which generally makes it a crime for a federal contractor to require or coerce workers to return a portion of their contractual pay to their employer. Copeland Anti-Kickback Act, ch. 482, § 1, 48 Stat. 948 (1934) (codified as amended at 18 U.S.C. § 874 (1976)). The section of the Copeland Act that is relevant here directs the Secretary to make reasonable regulations for federal contractors, "including a provision that each contractor and subcontractor shall furnish weekly a statement with respect to the wages paid each employee during the preceding week." 40 U.S.C. § 276c (1976).

The regulations at issue seek to implement these two statutes. They would alter the present regulatory scheme by (1) eliminating the so-called "thirty-percent rule" by which a locally prevailing rate could be set at the rate paid to a thirty-percent plurality of local workers; (2) combining data from adjacent rural counties but excluding any nearby urban counties when wage data in a given rural county is insufficient to determine a locally prevailing wage; (3) excluding from the prevailing-wage calculation for most building projects wages paid on similar local projects that were subject to the Davis-Bacon Act; (4) expanding the permitted use of semiskilled helpers in a number of ways, including permitting such a classification in areas where it is only an "identifiable" practice rather than a "prevailing" one and eliminating

the requirement that helpers may do only tasks distinct from those undertaken by other classes of workers; and (5) allowing contractors to submit a weekly statement certifying compliance with Davis-Bacon wage requirements, instead of requiring the submission of the actual weekly payrolls. *See* 47 Fed. Reg. 23,643, 23,657, 23,677 (1982) (to be codified at 29 C.F.R. § 3.3 and in scattered sections of 29 C.F.R. pts. 1 & 5).

Shortly after the rules were promulgated on May 28, 1982, the unions brought suit seeking declaratory injunctive relief. After a hearing on a motion for interim relief and cross-motions for summary judgment, the District Court on July 22, 1982, five days before the new regulations' scheduled effective date, granted a preliminary injunction barring implementation of all five provisions. *Building & Construction Trades Department v. Donovan*, 543 F. Supp. 1282 (D.D.C. 1982). On December 23, 1982, the District Court granted summary judgment for plaintiffs on four of the five provisions at issue. *Building & Construction Trades Department v. Donovan*, 553 F. Supp. 352 (D.D.C. 1982). The court declined to enjoin the elimination of the thirty-percent rule in the formula for calculating the locally prevailing wages. As to this provision, the court found that the statute left the task of defining the term "prevailing wage" to the Secretary, and that "Congress was fully aware that the definition might or would be adjusted depending on existing conditions." *Id.* at 354 (citing, *inter alia*, 74 CONG. REC. 6516 (1931); 75 CONG. REC. 12,365 (1932)).

The District Court found the statutory language and legislative history as to the remaining four provisions somewhat ambiguous, and relied heavily on contemporaneous and consistent administrative practice as a clue to Congress's intent. The court relied most heavily—almost exclusively—on this contrary administrative practice in striking down the proposed exclusion of urban counties from the prevailing wage calculation in rural areas and

the exclusion of local Davis-Bacon projects from that calculation. *See id.* at 353-54.

With regard to the remaining two provisions, the court found, in addition to administrative practice, more direct indications of congressional intent. The court struck down the rule that a contractor need only submit a generalized affidavit certifying compliance with wage laws, rather than detailed payrolls, because the statute by its terms required weekly statements as to the wages paid "each employee," 543 F. Supp. at 1288, and because the new regulation "would render the Act largely unenforceable," 553 F. Supp. at 354. The court overturned the proposals for allowing increased use of semiskilled helpers because the distinction that the Act intended to draw between skilled and unskilled labor in practice could be maintained "only if the tasks of the helper class are defined as discrete and distinguishable from those of laborers and mechanics," *id.* at 355, and because allowing contractors to use helpers when it was merely an "identifiable" classification in the area would be contrary to the statutory command that wages set by the Secretary be "prevailing for . . . classes" in the area, 543 F. Supp. at 1285.

Both parties appealed. We discuss each provision of the new regulations in turn.

II

A. *The Thirty-Percent Rule*

Under a regulatory procedure in effect since 1935, the Secretary follows a three-step process to determine the prevailing wage for a given class of workers in a given area. First, if any single wage is paid to a majority of the workers in that class, that is deemed the prevailing wage. Second, if there is no single wage paid to a majority of workers, any wage paid to at least thirty percent of the workers is the prevailing wage. Third, if no

single wage is paid to a thirty-percent plurality, then a weighted average becomes the prevailing wage. 29 C.F.R. § 1.2(a) (1982); *accord* Labor Department Regulation No. 503 § 2 (1935), *reprinted in* Joint Appendix (J.A.) at 180-81. The new regulation proposed by the Secretary for defining the term "prevailing wage" would eliminate the second step: if a majority of the workers in a given class did not earn a single wage, then a weighted average would be used. 47 Fed. Reg. at 23,652 (to be codified at 29 C.F.R. § 1.2(a)(1)).

The rationale offered by the Secretary for the change was that the thirty-percent rule does not comport with the definition of "prevailing," that it "gives undue weight to collectively bargained rates," and that it is inflationary. *Id.* at 23,644, 23,645. The unions argue that the new definition does not fit within the common meaning of "prevailing" and that Congress's refusal to change the statute in 1932 and 1935 when informed of the Secretary's policy of setting the prevailing wage at the rate paid the greatest number of workers indicates that Congress intended the prevailing rate to be the "modal" rate. The unions also assert that under the new rule a third or more of the wage rates issued by the Secretary would be based on "artificial" averages rather than any actual rate, which they say is contrary to the policy of the Act.

We affirm the District Court's upholding of the new rule, generally for the reasons stated in its opinion. *See* 553 F. Supp. at 354. In brief, the statute delegates to the Secretary, in the broadest terms imaginable, the authority to determine which wages are prevailing. *See* 40 U.S.C. § 267a(a) (1976) ("the wages that will be determined by the Secretary of Labor to be prevailing"). The legislative history confirms that it was envisioned that the Secretary could establish the method to be used. *See, e.g.*, 74 CONG. REC. 6516 (1931) (remarks of Rep. Kopp) ("A method for determining the prevailing wage rate might have been incorporated in the bill, but the Secre-

tary of Labor can establish the method and make it known to the bidders."). There is no indication that Congress's failure to change the method used by the Secretary since 1932 was intended to bind him to that method forever, and we will not infer such an intent when the statutory language is so plainly to the contrary.

Having determined that the statute empowers the Secretary to adopt "regulations with legislative effect," *Batterton v. Francis*, 432 U.S. 416, 425 (1977) (interpreting statute providing that term "unemployment" is to be "determined in accordance with standards prescribed by the Secretary"), our task is limited to ensuring that the new definition is not one "that bears no relationship to any recognized concept of [the statutory term] or that would defeat the purpose of the [statutory] program." *Id.* at 428. The Secretary's new definition of "prevailing" as, first, the majority rate, and, second, a weighted average, is within a common and reasonable reading of the term. *Cf.* 75 CONG. REC. 12,365 (1932) (remarks of Rep. Connery, floor manager of 1932 amendments) (endorsing an averaging method of determining the prevailing wage). The definition also would not defeat the essential purpose of the statute, which was to ensure that federal wages reflected those generally paid in the area.

B. *Exclusion of Urban Counties from Rural Wage Determinations*

The Secretary's proposed regulations provide that, where there has not been sufficient similar construction in the county in which a project is located to determine a prevailing wage, he is to look to wages paid on similar construction in surrounding counties, except that projects in metropolitan counties may not be used as a source of data for projects in rural counties and vice versa. 47 Fed. Reg. at 23,655 (to be codified at 29 C.F.R. § 1.7(b)). The target of the unions' attack in this case is the final proviso regarding exclusion of urban counties

from rural wage determinations,[1] which the unions assert is a departure from longstanding administrative practice and inconsistent with congressional intent. Neither party questions the Secretary's basic claim of authority to look beyond the county line if necessary to determine the prevailing wage in the county in which the project is located. Because the basis for this general recognition of administrative authority is not entirely obvious, and because it is important to our upholding the new regulation, some discussion of it is warranted.

The language of the statute instructs the Secretary to determine the wages that are prevailing for classes of laborers and mechanics "employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State, in which the work is to be performed." 40 U.S.C. § 276a(a) (1976). Although on its face this language would appear to refer the Secretary only to projects in the same civil subdivision as the contract work, no one has interpreted it that way. Since at least 1935, the Secretary has routinely looked to nearby locales if there was insufficient prior construction in the project county to determine a prevailing wage. *See, e.g.*, Labor Department Regulation No. 503 § 7(2) (1935), *reprinted in* J.A. at 182 (if there has been no similar construction in county in recent years, "the report shall cover wage conditions in the nearest large city"); 29 C.F.R. § 1.8(b) (1982) (if no similar construction in area, "wage rate paid on the nearest similar construction may be considered"); 21 Fed. Reg. 5801, 5802 (1956) (same). Further, as noted, neither the parties nor the amici here seriously dispute that construction.

---

[1] Since there is usually enough similar construction in metropolitan areas to provide data necessary to make a wage determination, the proviso would generally affect wage determinations only in rural areas, where there tends to be less construction.

Most important, the legislative history of the statute suggests that Congress contemplated that the Secretary's authority to determine prevailing wages extended to finding the best way to do so. The Davis-Bacon Act itself and the 1935 amendments passed through both houses of Congress with no discussion of the problem of how the prevailing wage would be determined in villages too small to have a settled wage for the various crafts needed. However, during the House debate on the vetoed 1932 amendments, which were substantially identical to the 1935 amendments on this point, the floor manager, Representative Connery of Massachusetts, addressed the question:

> Mr. O'CONNOR. But there may be many villages that have no plumbers in them, men actually working as plumbers. Bricklayers and metal workers and other highly skilled trades may not be found in a village in sufficient numbers to enable the Secretary of Labor to establish a prevailing rate of wage.
>
> Mr. CONNERY. I think the Secretary of Labor, when he figures out these predetermined rates of wages, will be able to determine that. Generally there is a town near enough to ascertain the prevailing rate of wage for that town. If there is a job in a little town in New York, there will be a city near enough in order to determine the prevailing rate of wage for that little town.
>
> Mr. O'CONNOR. But the bill reads "in the city, town, or village where the public work is carried on." [2]
>
> MR. CONNERY. As a practical matter, they have had no trouble in that regard in connection with the Davis-Bacon bill.
>
> MR. O'CONNOR. If they limit it to the language in this bill, there may be trouble about it.

---

[2] The bill actually read "in the city, town, village, or other civil subdivision of any State or Territories in which all or the principal part of the particular contract work is located." 75 CONG. REC. 12,363 (1932) (first reading of S. 3847).

> MR. CONNERY. In the Davis-Bacon bill there is the same proposition, and they have been getting along.

75 CONG. REC. 12,366 (1932). *See also id.* at 12,377 (remarks of Rep. Connery) ("The only practical way the committee found [to determine the prevailing wage in towns without wage scales] was that if you had a small town between two large cities they would take the prevailing wage scale of those two cities.").

This passage, while not crystal clear, suggests that Congress did not view the language in the statute as foreclosing the Secretary from implementing the Act in the way necessary to achieve its purposes. Clearly, if a prevailing wage could not be set in a given county by looking only to projects in that county, it was essential to the attainment of the general purpose of Congress—the predetermination of locally prevailing wages—that another mechanism be found. In essence, Congress anticipated that the general authorization to the Secretary to set the prevailing wage would encompass the power to find a way to do so in the interstitial areas not specifically provided for in the statute. *Cf. generally Permian Basin Rate Cases*, 390 U.S. 747, 780 (1968) ("we are, in the absence of compelling evidence that such was Congress' intention, unwilling to prohibit administrative action imperative for the achievement of an agency's ultimate purposes.").

In cases where there is insufficient data from a given civil subdivision to determine a prevailing wage, therefore, the Secretary is acting pursuant to the same kind of delegation of authority that we discussed above with regard to the formula for deriving a prevailing wage from the data collected, *see supra* p. 9. We thus do not think, as the unions appear to argue, that Congress intended to bind the Secretary to the method suggested by Representative Connery—adopting for rural areas the prevail-

ing wages of the nearest city. The thrust of the passage is that the entire question was left to the Secretary. Representative Connery's suggestion was apparently intended merely to show that some method of determining a wage would be found. Moreover, no language was inserted into the statute that would implement the suggestion, as one might expect for so specific an instruction.

We review the Secretary's choice of methods only to ensure that he is acting consistently with the purposes of the statute and that his choice is not arbitrary. We think it clear that the new regulation is rational and furthers the purposes of the statute. The Secretary's justification for the provision was that, because of the disparity between urban and rural wages, using demographically dissimilar counties for such determinations is unreliable. 46 Fed. Reg. 41,443, 42,445 (1981) (proposed rulemaking). Furthermore, the Secretary claimed, importation of high urban wages to rural areas has disrupted labor relations in rural areas because employees have been unwilling to return to their usual pay scales after a Davis-Bacon project has been completed. *See* 47 Fed. Reg at 23,647. His answer to the unions' argument that higher urban wages are justified in nearby rural areas because it is the urban workers who often do the work was that if that is generally true the wage scales for the surrounding rural counties would reflect that. *Id.* All of this makes sense, and the new regulation has not been shown to undermine the central purpose of the statute, which is to ensure that federal contractors pay the wages prevailing in the locality of the project. While it might be true that in some cases the reference rural counties might be more distant from the urban center than the project county, and that looking to them thus would not reveal the higher wages that should be paid in the project county, the bare allegation of that fact cannot overturn the Secretary's informed exercise of authority in an area in which he has considerable expertise and discretion.

The District Court relied exclusively or almost exclusively on what it saw as a longstanding and consistent administrative practice contrary to the proposed regulations in striking down the rural-urban wage determination provision and the exclusion of federal projects from wage determinations, *see infra* pp. 16-21. *See* 553 F. Supp. at 353-54; 543 F. Supp. at 1286-87. It should be noted first that with regard to the exclusion of urban data from rural determinations the administrative practice has not been quite as consistent as the District Court, in the rush of its expedited proceedings, appears to have been told. At least since 1977, the Secretary's Manual of Operations for Issuance of Wage Determinations Under the Davis-Bacon and Related Acts has provided that "[g]enerally, a metropolitan county should not be used to obtain data for a rural county (or visa [sic] versa)." J.A. at 104. Moreover, it is not only the present administration, but also that of President Carter, that has sought to formalize this practice in new regulations. *See* 46 Fed. Reg. 4305, 4314 (1981) (final rule) (providing for exclusion of metropolitan counties except in "extraordinary circumstances"), *stayed*, 46 Fed. Reg. 11,253 (1981), *and replaced*, 47 Fed. Reg. 23,643 (1982).

More fundamentally, our disagreement with the District Court's heavy reliance on administrative practice stems from our view that in promulgating these two rules —excluding urban data from rural wage determinations and excluding federal projects from all wage determinations—the Secretary was acting in an area as to which he had some discretion to reach a number of different results rather than an area of pure statutory interpretation as to which there is in theory only a single answer. As the District Court recognized, *see* 543 F. Supp. at 1290, prior administrative practice carries much less weight when reviewing an action taken in the area of discretion, when little more than clear statement is required, than when reviewing an action in the field of interpretation,

where it is thought that the agency's contemporaneous and consistent interpretation of one of its enabling statutes is reliable evidence of what Congress intended. *Compare CBS v. FCC*, 454 F.2d 1018, 1026 (D.C. Cir. 1971) (decision under discretionary "public interest" standard), *and Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) (same), *cert. denied*, 403 U.S. 923 (1971), *with United States v. Leslie Salt Co.*, 350 U.S. 383, 395-97 (1956) (interpreting statutory terms "debenture" and "certificate of indebtedness").

C. *Exclusion of Federal Projects from Wage Determinations*

The new regulations make a more dramatic break with the past in excluding from the prevailing-wage calculation prior federal or federally assisted projects subject to the Davis-Bacon Act's prevailing wage requirements. The new rules provide that such projects are not to be considered in wage determinations for building and residential construction projects "unless it is determined that there is insufficient wage data to determine the prevailing wages in the absence of such data." 47 Fed. Reg. at 23,652 (to be codified at 29 C.F.R. § 1.3(d)). The provision will not apply to highway and heavy construction projects, *id.*, where there is little nonfederal construction.[8]

The Secretary's rationale for the provision is that including federal projects in the wage determination skews the survey results upward, contrary to the purpose of

[8] The Manual of Operations for Issuance of Wage Determinations Under the Davis-Bacon and Related Acts defines "residential construction" as "the construction, alteration, or repair of single family houses or apartment buildings of no more than four (4) stories in height"; "building construction" is other construction of "sheltered enclosures with walk-in access"; "highway construction" means more or less what it says; and "heavy construction" is a catch-all category that includes such major projects as dams, railroads, ski tows, subways, and canals. J.A. at 100-02.

Congress. *See id.* at 23,645. Neither the District Court opinion nor the unions dispute the factual basis for this conclusion. Rather, the unions argue that the act and its legislative history, including congressional acquiescence to administrative practice, forbid exclusion of federal projects.

The language of the statute on this point refers to the wages determined to be prevailing for laborers and mechanics employed "on projects of a character similar to the contract work." 40 U.S.C. § 276a(a) (1976). The unions point out, quoting the District Court's opinion, that this language mandates the Secretary to consider "projects of a character similar," not "*private* projects of a character similar." *See* 543 F. Supp. at 1286. Leaving to one side the question of whether this point would *require* the Secretary to consider wages paid on federal projects if it no longer served the purposes of the statute to do so, there is substantial evidence in the legislative history and, more importantly, in the premises of the Act, that suggests that Congress did not intend wages on federal projects to be considered at all.

First, both the Senate and House reports to the original 1931 bill open, after a summary recommendation that the bill pass, with the following description of its purpose: "The purpose of this measure is to require contractors and subcontractors engaged in constructing, altering, or repairing any public building of the United States . . . to pay their employees the prevailing wage rates when such wage rates have been established by *private industry*." S. REP. No. 1445, *supra* p. 4, at 1 (emphasis added); H.R. REP. No. 2453, 71st Cong., 3d Sess. 1 (1931) (emphasis added). When the act was introduced onto the floor of the House, and several times during the debate, the purpose to have federal wages mirror those in private industry was reiterated. 74 CONG. REC. 6505 (1931) (remarks of Rep. Welch); *id.* at 6515 (Rep. Kopp) ("This bill simply requires the con-

tractors not to pay less than is paid in private industry."); *id.* at 6520 (Rep. Zihlman). (There was practically no debate on the bill in the Senate. *See id.* at 3918-19.)

We might be reluctant to rely on these somewhat offhand and isolated remarks in the legislative history were it not that they so plainly reflect the true purpose of the Act. The premise underlying the statute was that there was something wrong with the federal bidding process that prevented the government from achieving subsidiary goals of its construction program that a private contractor might be able to attain. Because federal projects were required by statute to be awarded to the lowest bidder, the government could not, as a private builder might, require that fair wages be paid on the project in order to be sure of quality workmanship, to ensure against labor strife, to maintain its name in the community, or, in the case of the federal government, to pursue equitable distribution of public construction monies. Such substandard wages might also have been more prevalent on federal projects because of their national sponsorship, which might have made them more likely to attract unscrupulous pricecutters than a private, local builder, advertising locally, would have been. Whatever the reason, the result was that workers on government building projects were being paid less than their counterparts in neighboring private projects. Thus, the 1931 committee reports state:

> The Federal Government must, under the law, award its contracts to the lowest responsible bidder. This has prevented representatives of the departments involved from requiring successful bidders to pay wages to their employees comparable to the wages paid for similar labor by private industry in the vicinity of the building projects under construction.

S. REP. NO. 1445, *supra* p. 4, at 2; H.R. REP. NO. 2453, *supra* p. 17, at 1-2; *see also* S. REP. NO. 332, *supra* p. 4, at 8 (reviewing legislative history of the Act) (the

problem of contractors paying below prior prevailing wage and transporting cheap labor to jobs "was particularly true of Government contracts where competitive bidding was in effect"); *Regulation of Wages Paid to Employees by Contractors Awarded Government Building Contracts: Hearings on H.R. 12, 122, 7005, 7254, and H.J. Res. 38 Before the House Comm. on Labor*, 72d Cong., 1st Sess. 15 (1932) (testimony of AFL President William Green) ("Because contractors seeking and securing Government contracts attempted to exploit workers and pay them a rate of wages that was far below the prevailing rate in private industries in the respective localities where buildings were erected, we strongly appealed to the Congress to enact this prevailing rate of wage law."); *cf. id.* at 63 (testimony of a general contractor) ("[I]n river and harbor work . . . I will guarantee [that] our company and all the private companies are paying higher wages to the dredge men than the Government is" when it acts as its own contractor.). *See generally supra* pp. 3-5 (discussion of purposes of Act).

With this as the Act's premise, it would make no sense to *require* the Secretary , when setting prevailing wages, to include federal projects in his survey. Since the problem to be remedied was the low wages paid on federal projects, to include them would only impede attainment of the ultimate goal of counterbalancing the flaws in the federal bidding system and equalizing federal and private wages.

The fact that the Secretary almost immediately began including federal projects in his wage surveys does not cast doubt upon this reading of congressional intent. The unions acknowledge that the Secretary did so, as the District Court put it, "notwithstanding the congressional mandate," only because as the Depression deepened there was very little private construction from which to derive a private prevailing wage. 543 F. Supp. at 1286. There-

fore, what the unions must argue is that Congress, in its refusal in the 1935 amendments to bar the Secretary from using federal data, not only acquiesced in such use but affirmatively required it.

What the unions and the District Court point to as evidence that Congress intended to mandate the practice is the change in the statutory language from wages "for work of a similar nature" in the 1931 Act to wages "for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work" in the 1935 amendments. *Compare* Davis-Bacon Act, ch. 411, § 1, 46 Stat. 1494 (1931) *with* 40 U.S.C. § 276a(a) (1976). What types of projects, the argument goes, could be more "of a character similar to the contract work" than federal ones?

The legislative history is very specific as to the intent of this change. After the passage of the 1931 Act, it developed that craftsmen in some industries were paid more than employees performing the same craft in other industries. In the 1932 House hearings, one witness gave the examples of riveters and electricians in the general building industry who would receive a higher wage, but would be employed far less steadily, than their brethren in the shipbuilding field. *Regulation of Wages Paid to Employees by Contractors Awarded Government Building Contracts: Hearings on S. 3847 and H.R. 11,865 Before the House Comm. on Labor*, 72d Cong., 1st Sess. 67 (1932) [hereinafter cited as *Hearings on S. 3847*] (testimony of shipbuilding trade representative, proposing addition of "in the same industry" to statute). To clarify that federal construction work wages should parallel the construction work wages prevailing in the area, and not the shipbuilding wages, Congress added the language that the unions cite. The committee reports explain:

> A provision in the bill makes clear the meaning of the standard "prevailing . . . on work of a similar

> nature." The present language leaves some doubt as to whether the statute refers to wages in the same craft or wages paid on similar construction. The provision would make the wage rates contained in the specifications conform to those "prevailing" for "the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work."

H.R. REP. No. 1756, 74th Cong., 1st Sess. 3 (1935); *accord* S. REP. No. 1155, 74th Cong., 1st Sess. 3 (1935).

It was thus no part of Congress's intent to require the Secretary to include federal projects in his wage surveys. Excluding such data was the path most consistent with the purposes of the statute. The Secretary nevertheless exercised his discretion to include these projects as a necessary expedient during the Depression in order to achieve the ends of Congress. *See generally supra* p. 13 (implied power to take action imperative for the achievement of the statute's purpose). To continue to include them now that federal wages are far above those paid in the private sector, however, would only exacerbate in the opposite direction the kind of problem—an inequality between federal and private wages—Congress was seeking to avoid. The fact that no Secretary has previously abandoned the practice does not take away from the current Secretary's power to fine tune his exercise of discretion.

D. *Expanded Use of Helpers*

Under current practice, the Secretary recognizes five classes of employees covered by the Act: skilled journeymen; unskilled laborers; and semiskilled apprentices, trainees, and helpers. The journeyman and laborer classes are well-defined and universally recognized; the former is generally identified with the traditional crafts, such as electrician or roofer, and often defined by whether the employee uses the tools of the trade. Apprentices and trainees, as the terms imply, are employees learning the

journeyman's craft and therefore are permitted to do some traditional journeyman's work, but they must be enrolled in a formal apprenticeship or trainee program approved by the Secretary. *See* 29 C.F.R. §§ 5.2(c), 5.5(a)(4), 5.15 (1982). The Secretary currently recognized a helper classification only if (1) the scope of the helpers' duties—meaning the physical tasks performed—is defined and can be differentiated from that of journeyman duties, and (2) the particular helper classification prevails in the area. *See* 47 Fed. Reg. at 23,647, 23,649, 23,659; *DeNarde Construction Co.*, Case No. 78-3, at 2 (Wage Appeals Bd. May 14, 1979), *reprinted in* Plaintiffs' Reply Memorandum of Points and Authorities in Support of Their Motion for Summary Judgment, exhibit 2, Record at 14.[4]

The new regulations would alter both of these limitations on the use of helpers on federal construction jobs. First, they would allow some overlap between the duties

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[4] Occasionally, but not always, a third criterion for recognition of a helper classification is mentioned: "the helper is not used as an informal apprentice or trainee." 47 Fed. Reg. at 23,649. *But see id.* at 23,647, 23,659 (not mentioned); *DeNarde* (same). This criterion appears to have been eliminated in the new regulations. The parties have not focused on it, however, and therefore neither do we.

The requirement that a classification be prevailing in an area also applies to journeymen and laborers, but appears not to apply to apprentices and trainees. *See* 29 C.F.R. § 1.2(a) (1982) (Secretary sets prevailing wage rate "for each classification of laborers and mechanics which [he] shall regard as prevailing in an area"); *id.* § 5.5(a)(4)(i) (apprentices permitted to earn less than predetermined wage for the work they perform, if they are registered); *id.* § 5.5(a)(4)(ii) (same for trainees). The new regulations would eliminate the prevailing-in-the-area requirement for journeymen and laborers, *see* 47 Fed. Reg. at 23,655 (to be codified at 29 C.F.R. § 1.7(d)) ("Classifications and wage rates will be issued for identifiable 'classes of laborers and mechanics.'"), but the unions do not complain about this provision.

of helpers and those of journeymen. While some distinction between skilled and semiskilled tasks would be retained, the essential functional distinction would be not the nature of the task done but rather the subordinate position of the helper vis-a-vis a journeyman. The new classification would be defined as follows:

> A "helper" is a semi-skilled worker (rather than a skilled journeyman mechanic) who works under the direction of and assists a journeyman. Under the journeyman's direction and supervision, the helper performs a variety of duties to assist the journeyman such as preparing, carrying and furnishing materials, tools, equipment, and supplies and maintaining them in order; cleaning and preparing work areas; lifting, positioning, and holding materials or tools; and other related, semi-skilled tasks as directed by the journeyman. A helper may use tools of the trade at and under the direction and supervision of the journeyman. The particular duties performed by a helper vary according to area practice.

47 Fed. Reg. at 23,667 (to be codified at 29 C.F.R. § 5.2 (n) (4)); *see also id.* at 23,668 (to be codified at 29 C.F.R. § 5.5(a) (1) (ii) (A) (1)) (when new categories not listed in wage determination are added to contracts, work to be performed by new classifications must not be performed by any existing classification, except as to helpers.). The second major change in the permitted use of helpers is that any given helper classification would need to be only "identifiable," rather than "prevailing," in the area in order to be included in the wage determination for a project. *Id.* at 23,655 (to be codified at 29 C.F.R. § 1.7(d)).

In addition, the new regulations would provide a new numerical limitation on the use of helpers under which there could be no more than two helpers for every three journeymen, i.e., a maximum of forty percent of the total number of helpers and journeymen could be helpers. *Id.* at 23,670 (to be codified at 29 C.F.R. § 5.5(a)(4)(iv)).

Also, if a worker listed on the payroll as a helper performed duties outside the definition provided in the regulations, or exceeded the forty-percent limitation, the worker would have to be paid the applicable wage for the work he or she actually did. *Id.*[5]

The Secretary's rationale for allowing expanded use of helpers was that the present limitations do not reflect "the widespread industry practice" of employing both particular craft and general utility helpers on construction projects. *Id.* at 23,647. The Secretary estimated that the expanded use of helpers would save the government $363.16 million in construction costs. *Id.* at 23,651. In addition, he stated, the new rules would increase job opportunities for less skilled workers, including young people, women, and minorities; encourage training; increase productivity; and enable more contractors to compete for government work. *Id.*

This last reason is presumably based on the fact that unions have historically permitted very limited use of helpers, seeking instead to ensure demand for skilled journeymen and the integrity of the apprenticeship route to that position. *See, e.g., id.* at 23,651 ("there are few helpers in union firms"); A. THIEBLOT, THE DAVIS-BACON ACT 154 (1975), *reprinted in* Record at 3893, 3978 (71.1% of nonunion contractors and 16.1% of union contractors surveyed use helpers for various crafts); S. SLICHTER, UNION POLICIES AND INDUSTRIAL MANAGEMENT 46 (1941) ("The building trades . . . undertake to prevent helpers from becoming competitors of journeymen by regulating the

[5] There are two other provisions that would apply to the use of helpers. First, an existing contract that does not contain a helper classification could be altered to allow the expanded use permitted by the new regulations. *Id.* at 23,668 (to be codified at 29 C.F.R. § 5.5(a)(1)(ii)(A)). Second, variances from the 40% rule could be obtained in areas where the current practice allows use of helpers in excess of forty percent of the total number of helpers and journeymen. *See id.* at 23,659.

work of the helper in such a way that he does not have an opportunity to learn the trade," such as by prohibiting him from using the tools of the trade.); Affidavit of Herbert R. Northrop (Wharton School Professor of Industry), J.A. at 108 ("More efficient deployment of labor [such as by allowing extensive use of helpers] is one reason why open shop construction today controls 65 percent of all construction . . . ."); Affidavit of Robert A. Georgine (President, AFL-CIO Bldg. & Constr. Trades Dept.), J.A. at 122-23 (collective bargaining agreements preclude many contractors from taking advantage of the changes in the new regulations). Apparently, the Secretary believes that more nonunion contractors would be able to compete for government jobs under the new regulations because they would be able to use the employee classification system that they are accustomed to using. *See* Affidavit of John L. Fiedler (construction firm president), J.A. at 114 ("[A] contractor who regularly uses helpers on privately funded construction work must reclassify helpers when he does work subject to the Davis-Bacon Act. . . . [T]his is economically unwise, since the productivity of the worker is not commensurate with his wage. Therefore, many merit shop contractors are deterred from performing federal or federally assisted construction contracts.").[6]

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[6] It is unclear whether the Secretary, in finding that more contractors would be able to compete for government work under the new rules, simply ignored the likely decrease in the number of unionized contractors who would be able to compete for such work, *see* Affidavit of Robert A. Georgine, *supra*, J.A. at 122-23, or instead believed that that decrease would be more than offset by the increase in nonunion bidders.

The unions disputed many of the claimed benefits of the expanded use of helpers, arguing *inter alia* that the new rules would discourage apprenticeship and training programs because contractors would find it easier simply to hire helpers to fulfill their need for semiskilled labor rather than set up a formal program. Because helpers receive far less training than do apprentices, the unions argued, the new rules would tend to

We consider first the provision that a helper classification need only be "identifiable" in an area to be used, and second the enlarged definition of a helper's duties.[7]

1. *"Identifiable" Classifications*

The provision requiring that a helper classification need only be "identifiable" in an area must be struck down because it operates to undermine the fundamental purpose of the Act: that wages on federal construction projects mirror those locally prevailing. We think it plain that, in the scheme of the Act, either of two methods will serve to lower the wages paid for certain work below those paid for the same work in the surrounding community. First, the work may be classified as it is in

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deny advancement to minorities, young people, and women, and would lead to a shortage of skilled craftsmen. *See, e.g.*, 47 Fed. Reg. at 23,647; Affidavit of Ray Marshall (former Labor Secretary), J.A. at 133, 138-40. In this court, the unions rely largely on the argument that the new regulations are directly contrary to the language and intent of the statute rather than on the ill effects of the changes.

[7] The District Court enjoined the operation of all the new regulations governing the use of helpers, including the 40% rule, the procedure for conforming existing contracts to the new regulations, and the procedure for a variance from the 40% rule for certain existing projects. *See* 543 F. Supp. at 1292 (preliminary injunction); 553 F. Supp. at 356 (permanent injunction). Nevertheless, like the unions in this court, the District Court only discussed the expanded definition of "helper" and the provision that a helper classification need only be "identifiable" in an area to be used. Evidently, the court regarded the helper provisions as a package, the essential elements of which were the two that it discussed; once those were struck down, there was no need to deal with the others since the Secretary would surely redraft the package, perhaps changing the minor aspects of it in the process. Not having the benefit of any significant discussion of the issues, we decline to rule on these aspects of the helper provision. Should the Secretary include them in any reissued rules, we will not be barred from considering them then.

the community—as, say "carpenter work"—but a lower wage may be paid for that classification than is paid in the community. Second, the same wage rate may be set for each job classification, but the work may be classified in a lower paying category—such as "carpenter's helper work"—than it is in the community. Thus, if a given lower paid job classification need only be "identifiable" in the community to be used on a government construction site, the wages paid for some work may well be less than those "prevailing" for that work in the community. To take a simplified example, suppose that unions dominate the construction industry in a certain city and require that any worker using carpenters' tools be a journeyman carpenter or apprentice. Nevertheless, suppose that one or two nonunion firms in the city use lower paid carpenter's helpers to rough-cut beams. In that case, a federal project that permitted workers who rough-cut beams to be termed "carpenter's helpers," because such a classification could be "identified" in the city, would not be paying the wage prevailing for the corresponding class of workers in that city. The prevailing wage for that kind of work would actually be the union wage for journeyman carpenters or apprentices.

We need not rely merely on logic to know that use of a less-than-prevailing classification may result in payment of lower wages than those prevailing in the community for the same work, and that that is prohibited by the Act. Congress in 1935 was quite clear that it understood that "prevailing wage scales [could be] broken down by intermediate classification," S. REP. No. 332, *supra* p. 4, pt. 3, at 12, and that such "underclassifi-[cation]," *id.*, was an evasion of the Act. The Senate committee reviewing the operation of the law in 1935 described the problem as follows: "The act also fails to be explicit on the matter of classification, with the result that many contractors were able to circumvent the law by hiring mechanics as common laborers, and then assign-

ing them to tasks which fell within the purview of one of the skilled crafts." *Id.* pt. 2, at 5; *see also id.* at 2 (listing creation of "arbitrary classifications known as semiskilled labor" as a method or device "to underpay labor" engaged on public works programs). The report gave the example of "rough 'saw and hammer' men" working on Public Works Administration projects who

> were paid at a rate considerably less than [the wages] prevailing for carpenters, although the work being performed was regarded by labor-union regulations as carpentry work. In a similar way, new grades and classifications sprang up all over the country, permitting high-grade skilled laborers to be placed in lower categories so that their rates of pay were less than those prevailing for skilled labor.

Id. pt. 3, at 12.

Although the 1935 committee recommended that the "classification" question "should be clarified by new legislation," *id.* pt. 2, at 5, it is not clear whether the statutory language regarding "classes of laborers and mechanics" was added with this in mind. *See infra* pp. 31-36. The House and Senate reports on the bill itself mention this language only with regard to the somewhat different problem of differing wages being paid for the same craft in different industries. H.R. REP. NO. 1756, *supra* p. 21, at 3; S. REP. NO. 1155, *supra* p. 21, at 3; *see supra* pp. 20-21. Nevertheless, various references in the legislative history strongly suggest that Congress thought either that such underclassification was already barred—for example, the earlier 1935 committee's references to contractors that "circumvent the law" and its conclusion that the law should be "clarified"—or that it certainly would be under the law as amended, *see Hearings on S. 3847*, *supra* p. 20, at 110 (remarks of Rep. Welch) ("If that were brought to the attention of the Secretary of Labor, if this bill were in full force and effect . . . . [he] would not permit it . . . .").

What is clear is that Congress regarded underclassification as contrary to the purposes, and most probably to the terms, of the Act. We have concluded that the Secretary's identifiable-classification regulation would virtually ensure underclassification in union-dominated areas. At least where the Secretary has not found the use of helpers as provided for in the new rules to be a nearly universal practice, *see* 47 Fed. Reg. at 23,647 (practice is merely "widespread"); Affidavit of John T. Dunlop (former Labor Secretary), J.A. at 188 ("The fact is that helpers exist in some areas and in some trades, and not in others."),[8] he is barred from allowing work that is "prevailing" categorized in one job classification to be placed in a lower paid classification merely because such a practice can be "identified" in the area.

2. *Definition of Helper Duties*

While we thus think it clear that the provision allowing use of helpers wherever the classification is "identifiable" must be struck down, whether the broadened definition of a helper's duties may stand is a far closer question. The issue is essentially this: if it is the prevailing practice in a community to allow lower paid but supervised helpers to undertake tasks that overlap with those of higher paid journeymen or laborers, may the

[8] We do not here attempt to define all the circumstances under which a new class of employees must be prevailing in an area before the Secretary may allow its use. We merely suggest that there *may* be some circumstances in which, perhaps for reasons of administrative convenience or because of a need to further some other congressionally expressed policy, *e.g.*, National Apprenticeship Act, 29 U.S.C. § 50 (1976) (Secretary is directed "to bring together employers and labor for the formulation of programs of apprenticeship"), or for other reasons, the Secretary could provide for classifications that do not prevail in a certain area. No such reason appears here. The propriety of eliminating the requirement that classifications of journeymen and laborers be prevailing in an area is not before us. *See supra* note 4.

Secretary allow that practice to be followed on federal projects in that town? The central objection to the Secretary's new regulation is that it would no longer define the "classes" of laborers and mechanics by the tasks a particular employee does, but rather in large part by whether he or she is acting under the supervision of a journeyman. *See* 553 F. Supp. at 355 ("the new regulations would allow helpers . . . to perform tasks of all sorts"); 543 F. Supp. at 1285 ("Under the new regulations, helpers not only are not defined in traditional terms, but they may perform any task throughout the entire construction field . . . .").[9]

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[9] A more fundamental objection to the Secretary's new regulations might be that the Davis-Bacon Act does not contemplate any semiskilled labor classifications whatsoever. This objection, not clearly pressed on us, *see infra*, would be based primarily on the fact that the statute speaks only of "laborers and mechanics," and not of "helpers." There is some legislative history supporting such an interpretation of the statute. For example, the report of the Senate committee investigating the operation of the Act in 1935 cited the following practice as a "device[] . . . to underpay labor":

> Instances of failure by Federal Emergency Relief Administration officials to pay the prevailing wage on Public Works projects, and *the creation by such officials of arbitrary classifications known as semiskilled labor specifically prohibited by the Federal Emergency Relief Administration regulations.*

S. REP. NO. 332, *supra* p. 4, pt. 2, at 2 (emphasis added).

There are, however, indications elsewhere in the legislative history that Congress used the term "laborers and mechanics" to mean all manual workers on construction sites, and not to exclude semiskilled employees. For example, at the end of the part of the Senate report just quoted, the committee recommended amendment of the Act so that it would require that the specifications for any project which "involve[d] the employment of *mechanics and/or laborers* . . . contain a provision stating the minimum wages to be paid *various classes of skilled, unskilled, and intermediate labor*," and that the contracts for such projects obligate the contractor to pay "all mechanics and laborers employed" the wages in the speci-

There is some legislative history that suggests that Congress in 1935 was thinking of a task-based definition of "classes" when it spoke of the problem of "underclassi-

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fications. *Id.* at 9 (emphasis added). Since it would make no sense to set wages for intermediate or semiskilled workers if they were not to be covered by the Act, it appears that the committee thought the term "mechanics and laborers" included some intermediate classifications other than skilled and unskilled labor. (The language "skilled, unskilled, and intermediate labor" was replaced by the phrase "laborers and mechanics" before the amendments were enacted, but no explanation of the change appears. The change may have been intended merely to make the language of the statute, which refers to "laborers and mechanics" thirteen other times, consistent throughout. In any case, the fact that the two phrases could appear so close together in a considered committee recommendation in which they must be read to refer to the same categories of workers suggests that it was not assumed by all that the two were contradictory.) Moreover, elsewhere in its report the committee plainly used the term "laborers and mechanics" to mean manual workers generally, with no thought of excluding semiskilled workers. *See, e.g., id.* at 1 ("public hearings were conducted and testimony of 100 witnesses (*laborers and mechanics*, representatives of labor, contractors, and representatives of various Government departments) was received") (emphasis added).

In addition, it appears that the Federal Emergency Relief Administration (FERA) regulations referred to in the Senate report themselves recognized semiskilled labor classifications, the wage rates for which were to "depend upon local custom." Federal Civil Works Administration Rules and Regulations No. 10 at 2 (1933), *reprinted in* J.A. at 198 (the Civil Works Administration was an arm of the FERA). Thus, what the committee referred to as a device to underpay labor in violation of the FERA regulations must not have been the use of intermediate classifications per se, but the "creation" of "arbitrary" semiskilled classifications not reflected in local practice, in order to underpay skilled labor.

Further support for a reading of the statute that does not bar the use of semiskilled classifications entirely is provided by the Secretary's longstanding interpretation of the Act to allow at least a limited use of helpers. *See supra* pp. 21-22. Also, the District Court in this case clearly thought the current use

fication." For example, the 1935 Senate committee considering the operation of the Act described the problem of contractors assigning to common laborers "*tasks* which fell within the purview of the skilled crafts," *see supra* p. 28 (emphasis added), and referred to the "rough saw and hammer men" category as a violation of the rule that "any man using carpenter's tools shall be paid carpenter's wages," S. REP. No. 332, *supra* p. 4, pt. 3, at 17.

Nevertheless, we do not think Congress intended to bind the Secretary to the job classification existing at that time, but rather merely spoke against a background of the task-based union practice being the prevailing one. The Senate report seems to take some pains to point out

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of helpers was permitted by the Act. *See* 543 F. Supp. at 1285. Moreover, the unions in this court appear not to quarrel with this view, for they quote the District Court's opinion at length and endorse its conclusions, *see* Brief for Appellees-Cross-Appellants at 31-33; elsewhere they argue that Congress's intent in this regard "had been consistently recognized and followed by the Secretary of Labor" until the challenged regulations, *id.* at 43. *But see id.* at 38-39 (disputing the government's view that the Senate committee accepted the use of legitimate semiskilled classifications). (The unions' position was unequivocally stated in their memoranda filed in the District Court: "[W]e do not take the position that Congress *precluded* recognition of semiskilled helpers under the Davis-Bacon Act. . . . Quite clearly, the Davis-Bacon Act does allow recognition of semi-skilled workers when they do, in fact, represent a prevailing practice and form a *distinguishable* class who perform discrete tasks." Plaintiffs' Reply Memorandum of Points and Authorities in Support of Their Motion for Summary Judgment at 10, 11, Record at 14 (emphasis in original).)

While we think the argument that any helper classification was barred by the statute is at least colorable, the long-held view of the Secretary and the legislative history of the statute taken as a whole persuade us to agree that the Secretary is empowered to recognize at least some form of semiskilled classification. The remainder of the present section considers whether the specific definition of "helper" proposed by the Secretary is barred by the statute.

that the reason the "rough saw and hammer men" classification resulted in underpayment of labor was that it was "a direct violation of the union rule *in general effect throughout the country*," *id.* (emphasis added); *see id.* at 12 (the work being performed "was regarded by labor-union regulations as carpentry work").

Moreover, there is no language in the statute that might be said to implement the supposed intent to mandate the union classification scheme. The only otherwise unexplained change worked by the 1935 amendments was the addition of the phrases "*various classes* of laborers and mechanics" and "*corresponding classes* of laborers and mechanics" in place of the 1931 reference to the rate of wage for "*all* laborers and mechanics." We see nothing inherently task-oriented about the term "classes." It seems likely that the addition of the word "classes" was intended merely to describe in a general way the nature of the wage predetermination the Secretary was to make under the new statute. Had the amendments required only that advertisements for bids contain "a provision stating the minimum wages to be paid all laborers and mechanics which shall be based upon the wages . . . prevailing for work of a similar nature," it might conceivably have been thought that a single minimum wage was to be set for construction work rather than a set of wages for the various classes or grades of workers involved.[10]

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[10] The vetoed 1932 act contained the term "grades" instead of "classes." The legislative history does not reveal the reason for the change, although it may have been to counter an interpretation of the word "grades" that was advanced by President Hoover's Secretary of Labor in a memorandum that accompanied the President's veto message. Secretary Doak wrote that the new law would

> require[] the determination of the rate of wages for the "various grades of mechanics and laborers," clearly indicating that the rate is to be determined not only for the different trades, as bricklayers and carpenters, but for the different grades of such workers within each trade, which

Further evidence that Congress did not intend to mandate the then-existing union practice is that, as the unions here admit, Congress specifically rejected a scheme whereby wages would be set at the union wage in all areas. *See Wages of Laborers and Mechanics on Public Buildings: Hearing on S. 5904 Before the Senate Comm. on Manufactures*, 71st Cong., 3d Sess. 9 (1931); Brief for Appellees-Cross-Appellants at 60; Reply Brief for Appellees-Cross-Appellants at 6. The following exchange during the House debate on the 1932 bill clearly indicates the congressional intent on the matter:

> Mr. JOHNSON of South Dakota. . . . I want to know if the union scale is to govern in all matters in this bill, particularly in those cities where I am convinced the racketeering end of union labor has taken control.
>
> Mr. CONNERY. The Secretary of Labor is the final arbiter, and I do not believe that he has taken the union scale absolutely. He has taken the prevailing rate of wage in those cities.
>
> Mr. JOHNSON of South Dakota. Then it would not be the intention of the chairman of the committee [Mr. Connery] that the union scale in all cases would be the prevailing rate?
>
> Mr. CONNERY. Personally, that is what I would like to see.

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would require an official determination of the comparative efficiency of individual workers employed on the work by the contractor or subcontractor.

75 CONG. REC. 14,589 (1932). The new term "classes" may have been inserted to assure that qualitative evaluations of workers within a certain type need not be made. Prior to the 1932 act, concerns about underclassification were voiced similar to those expressed prior to the 1935 amendments, *see Hearings on S. 3847, supra* p. 20, at 109 (testimony of shipbuilding trade representative) ("in the shipyards the line between the mechanic and the helper and the semiskilled man has been very largely broken down"), suggesting that the change from "grades" to "classes" was not intended to take into account new information on underclassification.

> Mr. JOHNSON of South Dakota. It would not be so construed in the bill if it is passed?
> Mr. CONNERY. No.

75 CONG. REC. 12,377 (1932); *accord id.* 12,379 (remarks of Rep. Ramspeck) (in some cases, the Secretary has not required the union scale). Since, as we have discussed, wage rates and classifications are essentially two sides of the same coin—they must be fixed in tandem to ensure that a given wage will be paid for given work—Congress's rejection of the then widespread union pay scales as the conclusive basis for the Secretary's predetermination of wages suggests that it similarly favored locally prevailing practices over the union classification scheme.

At bottom, we are unwilling to read the fairly ambiguous legislative references to a task-based classification system in such a way as to vitiate the clearly expressed congressional purpose to have federal wages mirror those prevailing in the area. *See, e.g.*, S. REP. No. 509, 72d Cong., 1st Sess. 2 (1932) ("This bill will in no way interfere with the natural increase or decrease of prevailing wage scales . . . ."); H.R. REP. No. 1756, *supra* p. 21, at 1 (The bill's "object is to reinforce and extend the principle of . . . the 'Bacon-Davis Act' . . . which requires the payment of the prevailing rate of wages to laborers and mechanics employed" on federal projects.); *see also* H.R. REP. No. 308, 88th Cong., 1st Sess. 2 (1963) (the Act "was designed . . . to prevent the disturbance of the local economy"). Yet were the Secretary barred in all cases from allowing helpers to do work that overlaps with the tasks done by journeymen, the wages paid on federal projects for certain work would sometimes not be the same as those prevailing in the area for the same work.

We do not say that there is no content to the statutory term "classes." *See generally* Donahue, *The Davis-Bacon Act and the Walsh-Healey Public Contracts Act: A Comparison of Coverage and Minimum Wage Provisions*, 29

LAW & CONTEMP. PROBS. 488, 508 (1964) (written by Labor Dep't Solicitor) ("[T]he Secretary generally takes the local corresponding classes of laborers and mechanics as he finds them, although he may not use criteria which detract from the term 'classes,' as used in the act."). We simply say that the core concept of that term—that those things within the class be differentiable from those things outside of it—is not weakened by a definition that makes the common element supervision by journeymen rather than use of tools.

The unions and the District Court present a subtler argument than one based on a direct congressional intent to define "classes" in a certain way. They appear to agree that the legislative history discussed above suggests only that Congress was aware of the need to prevent workers doing skilled work from being underpaid by being classified as semiskilled employees. The "crux" of the argument, as the District Court put it, is that "in practice" the distinction between skilled and unskilled or semiskilled labor "can be maintained only if the tasks of the helper class are defined as discrete and distinguishable from those of laborers and mechanics." 553 F. Supp. at 355. The argument is, in other words, that as a practical matter the Secretary is wrong to think that his definition is capable of enforcement, because it is simply too difficult to tell a helper from a journeyman on a job site.

We agree that discerning whether a person using certain tools is being directed and supervised by a journeyman is far harder than merely telling whether that person is using the tools of the trade. Nevertheless, there is a substantial policy that argues against simply choosing a rough and simple distinction, and that is that such a distinction might mean the wage scales on federal work would no longer reflect the prevailing practice in the area, which would be counter to the central purpose of the Act. We think the Secretary is entitled to try to come closer to achieving that purpose than his predecessors

have. *Cf. American Trucking Associations v. Atchison, T. & S.F. Ry.*, 387 U.S. 397, 416 (1967) ("[W]e agree that the Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice.").

The change may mean that some unscrupulous contractors will find it easier to shift what the prevailing practice denominates journeyman work onto helpers, but we find it difficult to second-guess the Secretary's view that he can catch them. We do not mean that we cannot review the Secretary's decision against a charge that he has effectively abandoned the field. But our deference to his choice is properly near its greatest when his decision turns on the enforceability of various regulatory schemes. He and not the courts can best balance such shifting dynamics as the incentive to violate the rules, the willingness of construction workers and competitors to complain, the ability of his inspection staff to respond and to discover violations, and the effectiveness of sanctions. *See, e.g., FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596-97 (1981) ("predictions as to the probable conduct of licensees and the functioning of the broadcasting market and . . . the Commission's assessment of its capacity to make the determinations required by [the alternative approach] . . . are within the institutional competence of the Commission").

Moreover, it is important to note that in this case the Secretary is not overturning a policy that has worked to perfection. He has concluded that "the current policies regarding semi-skilled crafts do not adequately reflect construction industry practices, in particular, the widespread use of helpers to perform certain craft tasks." 47 Fed. Reg. at 23,662. Perhaps as a result, federal wages today, rather than being below those in the private sector, are in some cases far above. *See* GENERAL ACCOUNTING OFFICE, THE DAVIS-BACON ACT SHOULD BE

REPEALED 71 (1979) (on twelve projects where wage determinations were higher than GAO-determined prevailing rate, average difference was 36.8%). No one has attacked this basic finding. The fact that the past practice has not been entirely successful tends to predispose a reviewing court to allow the Secretary to try a different scheme that, while more difficult to enforce, might on balance result in a closer approximation of the prevailing wage. *See American Trucking Associations*, 387 U.S. at 416 (regulatory agencies are supposed "to adapt their rules and practices to the Nation's needs in a volatile, changing economy").

The Secretary's definition here is not clearly unreasonable or on its face impossible to enforce. First, the distinction between supervised and supervising personnel is a common one in the labor field. It is thus not a completely untested distinction nor one that has proven impossible to draw.

Second, the new regulation, as modified by the requirement that the classification prevail in an area before it may be used, is an entirely logical response to the problem of federal construction practice not reflecting the widespread, but not universal, practice of using helpers. The new regulation would lower the current federal wages for the most part in those nonunion areas where they are significantly above the wages paid in the area. *See, e.g.*, A. THIEBLOT, *supra* p. 24, at 94, *reprinted in* Record at 3948 (effect of 35-day suspension of Act in 1971 was "negligible" in highly unionized areas, but "often substantial" in nonunion areas). In the union areas of the country where helpers are little used, they would not be allowed on federal projects. Thus, the new regulation would be narrowly aimed at correcting the federal practice in areas where it has not worked well, and would not result in a wholesale reduction in journeyman wages.

Third, but by no means least important, the Secretary has increased the likelihood that gross violations will be

caught, or at least that evasion will not get too far out of line, by putting the forty-percent cap on the use of helpers. While it might be desirable for the cap to reflect the extent of use in the area, rather than provide a single nationwide cutoff, the existence of some cap at least increases our confidence that the Secretary has considered the enforcement problems of the new definition and responded to them. *See* 46 Fed. Reg. at 41,456 (proposed 1:5 helpers-to-journeyman ratio was intended "to protect against possible abuse").[11] All things considered, the unions have not shown the Secretary's choice of regulatory schemes to be arbitrary or capricious.

E. *Allowing Submission of Summary Statement of Compliance with Wage Laws*

The Secretary's present regulations require covered federal contractors and subcontractors to submit weekly a copy of their payrolls, listing the name and address of each laborer or mechanic, and his or her classification, rate of pay, daily and weekly hours worked, deductions made, and actual wages paid. 29 C.F.R. § 5.5(a)(3) (1982). With the exception of a three-year hiatus from 1948 to 1951, the regulations have continuously required the submission of such payrolls since 1935, immediately after the Copeland Anti-Kickback Act was passed. *See* Construction Regulations and Regulations Issued Pursuant to So-Called "Kick-Back Statute" pt. II (1935), *reprinted in* J.A. at 172, 178-79 [hereinafter cited as 1935 Kick-Back Regulations]; 13 Fed. Reg. 524 (1948) (eliminating the provision); 16 Fed. Reg. 4430, 4431 (1951) (reinstating the provision).

Initially the Copeland Act required a "sworn affidavit" with respect to the wages paid, so the regulations required

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[11] We repeat that we have not been provided with a significant discussion of the issues regarding the 40% cutoff and therefore do not here pass on the propriety of it. *See supra* note 7.

that the payrolls be accompanied by an affidavit from the employer swearing that "the attached pay roll [was] . . . true and accurate" and that no unreported deductions or rebates had been made. 1935 Kick-Back Regulations, *supra* p. 39, pt. II, § 2, *reprinted in* J.A. at 178. In 1958, in a law to improve government procurement opportunities for small business concerns, the Copeland Act was amended to require a "statement" rather than a "sworn affidavit" and to make false statements a criminal offense. Act of Aug. 28, 1958, Pub. L. No. 85-800, § 12, 72 Stat. 967. The regulations thus now require that the payroll be accompanied by a statement indicating that the payroll is correct and complete, that the wage rates are not less than those determined by the Secretary, and that the classifications for each laborer or mechanic conform to the work done. 29 C.F.R. § 5.5(a)(3)(ii) (1982) (contract provision); *see id.* § 3.3 (regulatory requirement).

The new regulation would eliminate the requirement that payrolls be submitted, while maintaining the required weekly submission of a statement of compliance. The statement would certify that the payrolls the employer is required by the regulations to maintain are correct and complete, that each laborer or mechanic has been paid the full wages earned without impermissible deduction or rebate, and that the wage rates paid are the applicable ones for the classification of work performed. 47 Fed. Reg. at 23,669 (to be codified at 29 C.F.R. § 5.5(a)(3)(ii)); *id.* at 23,679 (to be codified at 29 C.F.R. § 3.3(b)).

The Secretary justified the change as a reduction in unnecessary paperwork, since the submitted payrolls are "infrequently used by many Federal agencies." *Id.* at 23,662. He estimated that the elimination of the requirement would save $100 million in compliance costs. *Id.* The unions disputed the cost savings involved, arguing that the estimates ignored the enforcement benefits of the payroll reporting requirement. *Id.* In this court, the

unions also cite Labor Department testimony that the payrolls are typically reviewed at the beginning of each project and spot-checked thereafter, with contractors that have a history of violations receiving more thorough checks. *See Federal Contractors' Reporting Requirements: Hearing on S. 1681 Before the Subcomm. on Federal Spending Practices and Open Government of the Senate Comm. on Governmental Affairs*, 96th Cong., 1st Sess. 18 (1979); *see also id.* at 147 (memorandum of HUD Inspector General) (contractor is less likely to underpay if he is required to submit weekly payroll reports). Since we find the Secretary's relaxation of the reporting requirement to be contrary to a direct statutory command, we need not reach the question of whether the payroll reporting requirement is, as the District Court found, "essential to the achievement of the Act's purposes" because of the transient nature of much construction business, 543 F. Supp. at 1288-89; *accord* 553 F. Supp. at 354 (new regulation "would render the act largely unenforceable").

We think that when Congress directed the Secretary to require contractors to "furnish weekly a sworn affidavit with respect to the wages paid each employee during the preceding week," Copeland Anti-Kickback Act, ch. 482, § 2, 48 Stat. 948 (1934), it meant that the wages paid each employee should be separately reported and sworn to. Under the Secretary's reading of the statute, the intent of the reporting provision would be little more than to add a further criminal penalty—that of perjury—to the crime of underpaying one's employees. We think the reporting provision was intended to play, in addition, a role in uncovering violations of the law. The most persuasive evidence of this is, of course, the word "each" and the requirement that the submission be "weekly." If the provision were meant only to add perjury to the criminal penalties provided by section 1 of the act, then it would seem unnecessary to have the affidavit refer to "each" employee since a statement as to all of them

would presumably be untrue if any one was underpaid. Under the Secretary's reading, it would also seem to be unnecessary to require a "weekly" submission, since a blanket statement at the end of the contract term would serve to criminalize any single breach during construction. Both of these provisions are most naturally read if one attaches an investigatory purpose to the act, that is, if the requirement was intended to aid in uncovering, not merely punishing, violations. Only a requirement that payrolls be submitted would help uncover violations, either by exposing contractors who accurately reported underpayments or by simplifying the task of investigators in spot-checking for violations or turning up unusual patterns.

Further support for this reading is provided by the initial phrase of the section in the original act, which read, "To aid in the enforcement of the above section." The "above section," section 1 of the act, made it a criminal offense to induce an employee to give up any part of the compensation to which he or she is entitled. Section 2 would only really "aid in the enforcement" of section 1's criminal provision if it helped catch violators rather than if it merely added to the underlying conduct a further penalty with apparently the same or greater elements of proof.

The legislative history of the act does not contradict, and to a large extent supports, this reading of the statutory language. The affidavit provision was not mentioned in the committee reports or on the floor of the House, where there was no debate on the act at all. There was also no debate in the Senate, except that Senator Copeland briefly introduced the bill, stating in part,

> It is the purpose of the bill to have the Secretary . . . require that an affidavit be made as to the pay roll each week so that we may have some way of reaching those who may be guilty of this practice [of requiring kickbacks from employees].

78 CONG. REC. 7401 (1934). While the words "as to" slightly support the Secretary's view that only a generalized affidavit *about* the wages paid was required, the mention of the weekly "pay roll" tends to support the unions' view that a sworn copy of the payroll was required. Further support for the latter position is provided by the stated purpose of providing "some way of reaching those who may be guilty of this practice." The word "reaching" must have meant "uncovering," supporting an inference that the provision had an investigatory purpose, because if the aim was merely further to criminalize a failure to pay, the penalties of section 1 would already provide "some way of reaching" violators.

Moreover, when the idea of requiring weekly reporting was advanced in the hearings that led to the enactment of the provision, the witnesses making the suggestion were crystal clear that the payrolls themselves should be submitted in order to allow them to be "watch[ed] . . . constantly." 1 *Investigation of So-called "Rackets": Hearings Before a Subcomm. of the Senate Comm. on Commerce Pursuant to S. Res. 74*, 73d Cong., 2d Sess. 791 (1933); *accord id.* at 816 (to "follow up" on predetermination of wages). Furthermore, in response to one witness's mention of a case in which a contractor made his subcontractor "present his pay roll," Senator Copeland indicated that he thought it a "very practical suggestion that every *pay roll* should be certified and sworn to," clearly implying that the Senator expected that the payrolls themselves would be filed. *Id.* at 793 (emphasis added). Similarly, the 1935 report of the committee investigating the operation of the Davis-Bacon Act, on which Senator Copeland served, mentioned the then new regulations requiring submission of payrolls, which the report said were issued "[p]ursuant to the provisions of the Copeland Act" and which it said would "enable[] a thorough check of the pay rolls." S. REP. No. 332, *supra* p. 4, pt. 2, at 5.

There is no indication that the subsequent amendments of the Copeland Act were intended to alter this original intent. *See* Act of Aug. 28, 1958, Pub. L. No. 85-800, § 12, 72 Stat. 967 (replacing "sworn affidavit" with "statement"); Act of May 24, 1949, ch. 139, § 134, 63 Stat. 108 (deleting reference to section 1 of the act). In fact, when the law was amended in 1958 to require only a "statement" instead of a "sworn affidavit," the Senate committee report stated that the act required the filing of "payroll information." S. REP. No. 2201, 85th Cong., 2d Sess. 2, 9 (1958); *see also id.* at 16 (reprinting National Advisory Committee for Aeronautics letter approving the change in "the filing of payroll information" so that only "a weekly statement of wages paid" would be required).

We think the Copeland Act clearly contemplated that the statement required to be submitted would provide some amount of wages paid to each employee each week. We do not say that the actual payrolls themselves, complete with their records of deductions and taxes withheld, must be required to be submitted. But we do think that the statement required by the act must contain at least individualized wage information for each covered employee.

III

We affirm the District Court as to the Secretary's elimination of the thirty-percent rule, the provision allowing use of helpers if that classification is "identifiable" in the area, and the provision allowing submission of a statement certifying compliance with wage laws. We reverse as to the provision excluding urban counties from certain rural wage determinations (and vice versa), the provision excluding prior Davis-Bacon Act projects from the wage calculations under the Act, and the expanded definition of a helper's duties.

It is so ordered.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1982

No. 83-1118

BUILDING & CONSTRUCTION TRADES' DEPARTMENT, AFL-CIO, *et al.*

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, *et al.*,
Appellants

And Consolidated Case No. 83-1157

[Filed Jul. 5, 1983]

ORDER

It is ORDERED, *sua sponte*, that the Clerk shall withhold issance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* Local Rule 14, as amended on November 30, 1981 and June 15, 1982. This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

For the Court

GEORGE A. FISHER
Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1982

Civil Action No. 82-01631

No. 83-1118

BUILDING & CONSTRUCTION TRADES' DEPARTMENT, AFL-CIO, *et al.*,
Appellees

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, *et al.*,
Appellants

And Consolidated Case No. 83-1157

[Filed Sep. 16, 1983]

Before: Edwards, Circuit Judge, McGowan and MacKinnon, Senior Circuit Judges

ORDER

On consideration of the Petition for Rehearing of Building & Construction Trades' Department, AFL-CIO, filed August 19, 1983, it is

ORDERED by the Court that the aforesaid Petition is denied.

Per Curiam

For the Court:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

Civil Action No. 82-10631

No. 83-1118

BUILDING & CONSTRUCTION TRADES' DEPARTMENT, AFL-CIO, *et al.*,

Appellees

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, *et al.*,

Appellants

And Consolidated Case No. 83-1157

[Filed Sep. 16, 1983]

Before: Robinson, Chief Judge; Wright, Tamm, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork and Scalia, Circuit Judges, and McGowan and MacKinnon, Senior Circuit Judges

ORDER

The Suggestion for Rehearing *en banc* of The Building & Construction Trades' Department, AFL-CIO, filed August 19, 1983, has been circulated to the full Court and no member has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid Suggestion is denied.

Per Curiam

For the Court:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1983

No. 83-1118

BUILDING & CONSTRUCTION TRADES' DEPARTMENT, AFL-CIO, *et al.*

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, *et al.*,
Appellants

And Consolidated Case No. 83-1157

[Filed Oct. 4, 1983]

Before: Edwards, Circuit Judge, McGowan and MacKinnon, Senior Circuit Judges

ORDER

On consideration of the motion of Appellees-Cross Appellants Building and Construction Trades' Department, AFL-CIO, for Stay of Mandate and of the opposition thereof, it is

ORDERED by the Court that the motion is partially granted and the Clerk is directed to withhold issuance of this Court's mandate through October 26, 1983.

Per Curiam

For the Court:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-1631

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, *et al.*,

Plaintiffs,

v.

RAYMOND J. DONOVAN, *et al.*,

Defendants.

Filed Jul. 22, 1982

MEMORANDUM ORDER

This is a motion for a preliminary injunction [1] which seeks to restrain the enforcement of certain regulations issued in implementation of the Davis-Bacon Act, 40 U.S.C. § 276a *et seq.*, and the Copeland Anti-Kickback Act, 40 U.S.C. § 276c. The regulations are to take effect on July 27, 1982.[2]

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[1] Plaintiffs are the Building and Construction Trades Department, AFL-CIO; the American Federation of Labor and Congress of Industrial Organizations, and several other labor unions. Raymond J. Donovan, Secretary of Labor; and Robert B. Collyer, Deputy Secretary of Labor for Employment Standards; and William M. Otter, Administrator of the Wage and Hour Division, are defendants herein.

[2] The action was filed on June 11, 1982. On July 9, 1982, plaintiffs sought a temporary restraining order, but that application was not pressed in view of the Court's commitment to hear the preliminary injunction motion and cross motions for summary judgment prior to July 27, 1982. Briefs were filed on July 15 and 19, and a hearing was held on July 20. Because of the short deadline, the Court is deciding today only the preliminary injunction issues; the summary judgment motions are under advisement.

I

The Davis-Bacon Act was enacted in 1931 and substantially amended to achieve its present format in 1935. Its principal purpose is to protect employees on federal projects by guaranteeing to them a minimum wage based on local prevailing wage rates. The Copeland Anti-Kickback Act was enacted in 1934, its purpose being to deter kickback practices by contractors on public construction projects. The issues here revolve around regulations issued after appropriate rule-making[3] by the Secretary of Labor in May 1982 which depart significantly in five respects from the regulations or interpretations which have been in effect since the early 1930s. The plaintiffs challenge the legality of the regulations in all of these respects.

On this motion for preliminary injunction the Court must consider whether plaintiffs have demonstrated (1) a strong showing that they are likely to prevail on the merits of their claims; (2) that without an injunction they will be irreparably injured; (3) that issuance of the injunction will not substantially harm other parties interested in the proceedings; and (4) that the public interest favors the grant of an injunction. *Washington Metropolitan Area Transit Commission* v. *Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977).

II

In the view of the Court, plaintiffs have demonstrated a substantial likelihood that they will prevail on the merits. That conclusion is based in part on the Court's review of the language of the statute and its legislative history (which are discussed in this part of the opinion) and on the long and consistent administrative practice prior to the issuance of the new regulations (Part III *infra*).

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[3] There are no claims of procedural irregularity.

1. The Davis-Bacon Act establishes that the Secretary shall issue wage determinations based on the "wages . . . prevailing for the corresponding classes of laborers and mechanics" in the area. The parties are in disagreement on the question of whether this language permits the Secretary to issue regulations which would permit a substantial increase in the issuance of wage rates for semi-skilled "helpers." The new regulation provides for such an increase (1) by defining "helpers" as a class of "mechanics or laborers"; (2) by eliminating the requirement that the helper classification be prevailing in an area as long as it is "identifiable"; (3) by allowing the use of helpers for forty percent of the total number of workers in a particular classification and by permitting even that limit to be exceeded under certain circumstances; and (4) by adding helper classifications to a wage determination even though they were not included at the time the contract was awarded. In the opinion of the Court, these changes are not consistent with the statute.

At the time of enactment of the Davis-Bacon Act, Congress was acutely conscious of efforts by some employers to classify workers as "helpers" in order to avoid paying the skilled laborers' wage.[4] The Senate Committee report noted that wage standards had

> largely broken down by intermediate classifications of labor and failure to retain the strict lines of demarcation intended to be drawn and maintained between skilled and unskilled labor. The whole tendency has been for wages of the skilled group to descend toward the level of the unskilled group, this by reason of intermediate classification devices.

The report concluded by recommending that construction contracts contain a provision stating that the minimum

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[4] See, *e.g.*, 1932 House Hearings at 109-10; 1934 Hearings before a subcommittee of the Senate Committee on Education and Labor, pursuant to S. Res. 228, 73rd Cong., 2d Sess. (1934), pp. 414, 428, 559, 530-31.

wages to be paid "various classes of laborers and mechanics" shall be based on wages prevailing "for the corresponding classes of laborers and mechanics," the language ultimately adopted in 1935. See S. Rep. No. 332, 74th Cong., 1st Sess. (1935), Part 3, at pp. 13, 15-17.

The new regulations will permit precisely that which Congress intended to halt in 1935. The concept of "classes of laborers or mechanics" was and is central to the statutory scheme. Under existing and long-established industry and administrative practice, a "class" of workers is one that has been historically recognized as such and whose members perform well-defined tasks. Helpers have therefore been recognized as a class only when their use has been prevailing in an area and they have formed a distinguishable group performing discrete tasks.

Under the new regulations, helpers not only are not defined in traditional terms, but they may perform any task throughout the entire construction field: they are "general helpers." As a consequence, such individuals would be allowed, at the discretion of the contractors, to perform the tasks of laborers, or journeyman mechanics, and of laborers and mechanics on a cross-craft, multi-trade basis. Obviously, if contractors could thus assign a helper to perform the tasks of any and all classes of laborers and mechanics and they could do so at lesser pay, they will do just that, and the requirement that wages be based on "corresponding classes" will effectively be read out of the law.[5] As the Wage Appeals Board

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[5] Former Secretary of Labor John T. Dunlop states in an affidavit submitted to the Court that

> there is no practice of 'jack-of-all-trades' helpers much less multi-craft helpers. Injecting these foreign classifications under these circumstances and providing contractors use them a competitive advantage reflects not recognition of industry's practice or local practice, but has the consequence of undermining prevailing recognized local practices and wage rates.

said in *Fry Brothers Corp.*, 123 WAB No. 76-6 (June 14, 1977), at pp. 15-16:

> If a construction contractor who is not bound by the classifications of work at which the majority of employees in the area are working is free to classify or reclassify, grade or subgrade traditional craft work as he wishes, such a contractor can, with respect to wage rates, take almost any job away from the group of contractors and the employees who work for them who have established the locality wage standard. There will be little left to the Davis-Bacon Act.

Moreover, under existing administrative practice, a helper classification is recognized only if it is "prevailing" in a particular area; under the new regulations, the use of helpers need only be "identifiable" to be recognized. Yet the statute itself refers to "wages . . . prevailing for . . . classes," not to wages identified for classes.[6] The effect of this change will be that when there is a single "helper" or a small group of helpers in a town or a metropolitan area, helpers may be employed in substitution of traditional craft workers throughout that area in all aspects of construction work. In that respect, again, the new regulations will depart both from prior practice and from the central purpose of the Act.

For these reasons, it is unlikely that, when the merits are reached, this regulation can be allowed to stand.[7]

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[6] If there is no prevailing practice in the locality to employ helpers, they may not be used for Davis-Bacon Act purposes.

[7] The Secretary defends the regulation in part on the ground that it will facilitate non-formal training of women, minorities, and young workers. Memorandum, p. 38. In fact, it will assign members of such groups to the lowest classification of workers, and it is likely keep them there on a permanent or long-term basis. Much of the Secretary's other explanations for the new regulation revolve around cost savings, but there are also references to his belief that the use of helpers will increase efficiency and productivity

2. The 1935 amendments to the Act direct the Secretary, in his ascertainment of the prevailing wage, to determine wages for "projects of a character similar to contract work." 40 U.S.C. § 276(a). The present regulation, which became effective contemporaneously with the 1935 statutory enactment, permits the Secretary, in performing this function, to include the wages paid in federal construction projects. The regulation issued two months ago explicitly mandates to the contrary that in compiling wage rate data the Secretary "will not use data from Federal or federally assisted projects" unless wage data from the private sector are insufficient for the Secretary's purpose.[8] In the opinion of the Court, the existing regulation far more faithfully reflects the intent of Congress than that which has just been issued.

In the first place, the statute expressly mandates the Secretary to consider "projects of a character similar"; not "*private* projects of a character similar." If a limitation or qualification is to be read into the statute it would have to be on the basis of extrinsic aids to construction, such as legislative history or administrative practice. But these aids support the plain meaning of the statute; they do not contradict it.

The congressional commitee reports published at the time of the original enactment of the Davis-Bacon Act in 1931 indicated that only "wages established by private industry" could be regarded as constituting the appropriate standard for the ascertainment of the prevailing wage. However, a serious problem arose with this standard when, during the Depression, very little private construction was going on. Accordingly, notwithstanding the congressional mandate, both Secretary Doak and Secretary Perkins considered also data from publicly-

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and to the fact that helpers are widely used in private industry. None of these reasons satisfactorily explains the departure from prior practice. See Part III *infra*.

[8] Certain types of projects are also exempt.

financed projects in determining wage rates for Davis-Bacon Act purposes, and this administrative practice was duly drawn to the attention of the Congress when it considered amendments in 1934.

The amendments were enacted in 1935, and the language "work of a similar nature" was changed to "project of character similar to the contract work"—a change which directed an alteration of the focus from similarity of tasks to similarity of projects. Further, notwithstanding the departmental practice after 1931, neither the committee reports nor the legislative debates this time contained any language which could be read as restricting the universe of projects to those of a private nature.

It appears to the Court that this history does not support the conclusion that, contrary to the language of the statute, Congress intended to limit, and did limit, the Secretary to private construction in making his wage determinations. It follows that this aspect of the regulation is unauthorized by law.[9]

3. The next point of dispute between the parties concerns the wage rates to be used where there has been no significant construction on the basis of which a prevailing wage rate could be established, especially with respect to rural areas. The Davis-Bacon Act provides that the geographic reference point for prevailing wage determinations is the "city, town, village, or other civil subdivision of the state in which the work is to be per-

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[9] The Secretary seeks to justify his change in the regulations on the basis of the argument that the inclusion of data from government construction projects improperly raises the level of the prevailing wage. However, as the Supreme Court has pointed out, "the Davis-Bacon Act 'was not enacted to benefit contractors, but rather to protect their employees from substandard earnings by fixing a floor under wages on Government projects.'" *Walsh* v. *Schlecht*, 429 U.S. 401, 411 (1977).

formed. . . ." 40 U.S.C. § 276a(a). Long-standing regulations provide that

> If there has been no similar construction within that area in the past year, wage rates paid on the nearest similar construction may be considered.[10]

The regulation just issued contains similar language but adds a proviso to the effect that

> . . . projects in metropolitan counties may not be used as a source of data for wage determination for a rural county.

The legislative history of the Act shows that the drafters concluded that, as Congressman Connery, chairman of the House Committee on Labor in 1931, put it when asked about the establishment of prevailing wage rates with respect to small towns, "[t]he only practical way the Committee found was that if you had a small town between two large cities they would take the prevailing wage scale of those two cities." 75 Cong. Rec. 12376-77. See also, the debate reported in 75 Cong. Rec. 12365-66.[11]

The Secretary correctly points, on the other hand, that concern had been expressed in Congress about the indiscriminate importation of metropolitan wages to upset rural wage scales. *Legislative History of the Act Amending the Prevailing Wage Section of the Davis-Bacon Act*, House Committee on Education and Labor,

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[10] Another regulation (sec. 7 of regulation 503) refers to use of data from the "nearest large city" when there has been no construction of a similar character in recent years. These regulations appear to have been consistently interpreted as permitting the use of wage data from nearby metropolitan centers for the establishment of the prevailing wage for a rural area.

[11] And see, 25 U.S.C. § 450e; 33 U.S.C. § 1372; and 12 U.S.C. § 1749a(f) where the Congress, unlike here, limited wage applications to "similar construction in the *immediate* locality" (emphasis added).

88th Cong., 2d Sess. at 24 (1964); see also, Senate Report No. 332, 74th Cong., 1st Sess. pp. 10, 13 (1935).[12]

It is fair to say that the legislative history is mixed, and the Court concludes that without the consideration of the factor of administrative practice (see Part III *infra*), the proper meaning of the statute on this aspect of the case would not be free from doubt.

4. Section 1 of the Davis-Bacon Act provides that every covered federal construction contract shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics that "will be determined by the Secretary of Labor to be prevailing" for corresponding classes of laborers and mechanics. Existing regulations provide that [13]

> in the event that there is not a majority paid at the same rate, then the [prevailing wage rate in the area shall be that] paid to the greater number: Provided, such greater number constitutes 30 percent of those employed.

The new regulation [14] specifies that the prevailing wage shall be

> the wage paid to the majority (more than 50%) [or] if the same wage is not paid to a majority . . . the 'prevailing wage' shall be the average of the wages paid, weighted by the total employed in the classification.

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[12] However, the Secretary's reference (Memorandum, p. 23) to a statement by Congressman Bacon, in which he warned against the importation of "cheap bootleg labor" into a community, is ill-advised, for it does not demonstrate that Congress, which was basically interested in protecting workers against substandard wages, objected to the use of metropolitan wages in nearby small towns.

[13] See 29 C.F.R. § 1.2(a).

[14] 47 Fed. Reg. 23,652 (1982).

The Secretary's position with respect to this provision, too, is not without support.

It has consistently been held that the Act itself does not establish any definition of "prevailing wage," this being the Secretary's responsibility.[15] This principle would seem to be sufficient to allow the Secretary to select a standard other than the thirty percent rule, provided it is a reasonable one.

Plaintiffs rely to the contrary primarily upon a dictionary definition of "prevailing" as meaning more frequent, as distinguished from being a synonym for "majority." Even if one were to consider this to be the true test of the meaning of the statute, it does not exclude the possibility that the Secretary, in the exercise of his discretion and on the basis of his expertise, may choose a fifty percent standard as being prevailing.

Thus, it would appear that if this issue came up on a blank slate, the new regulation would be upheld. However, the fact is that the Secretary has given no reasoned explanation for the new regulation,[16] which departs from a rule adopted by the Department of Labor on the very day the 1935 Act became effective. Thus, for the reasons discussed below, it is likely that on this basis the plaintiffs will be able to prevail on this aspect of the case when the Court reaches the merits.

5. The Copeland Act requires the Secretary to issue regulations for federal contractors, including regulations

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[15] However, as noted in note 27 *infra*, the Secretary is given broad, basically unreviewable discretion primarily with respect to individual wage determinations, not with regard to rule-making decisions.

[16] The Secretary's reasons for adopting a new regulation—primarily that the thirty percent rule gives undue weight to collective bargaining and that it is inflationary—are not in the least persuasive, for they bear no relationship to the purposes of the statute.

requiring them to "furnish weekly a statement with respect to the wages paid each employee during the preceding week." 40 U.S.C. § 276c. The question in dispute between the parties is whether the statute requires the actual submission of the contractors' weekly payroll—as the current regulation does [17]—or whether it sanctions the new regulation which requires only the submission of a statement of compliance in which the contractor certifies that he has paid the required wages to all of his employees.[18]

The Secretary rests essentially on the proposition that the statute makes no mention of payrolls or payroll records, and on the statement of Senator Copeland, sponsor of the law, to the effect that only affidavits "about" the payroll are required. Memorandum, p. 32. But these arguments fail to address the central fact that the statute requires contractors to submit to the Secretary each week information as the wages paid to "each employee" during the preceding week. A general affidavit covering the wages paid to all the employees during the preceding week obviously does not comply with that mandate.[19]

Moreover, it appears, contrary to the Secretary's position, that actual payroll information is essential to the achievement of the Act's purposes.[20] Unless precise rec-

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[17] Section 5.5(a)(3), 3.3(b), and 3.4.

[18] 47 Fed. Reg. 23668, to be codified at 29 C.F.R. § 55(a). The regulation also provides that the contractor shall submit the payroll records upon request of the Secretary.

[19] The legislative history likewise supports the payroll submission requirement. See Senate Report 332, 74th Cong., 1st Sess. 5-6 (1935); Hearings Before the Subcommittee of the Committee on Commerce Pursuant to S. Rep. 74, 73rd Cong., 2d Sess. (1933) pp. 791-97, 816-17; 1934 Hearings of Senate Committee on Education and Labor, pp. 192-93. Indeed, an effort in 1979 to eliminate the requirement of payroll submission failed of enactment.

[20] Both the Department of Labor and other departments have publicly so stated in the recent past. See Hearings before the

ords are submitted to the Department on a weekly basis, they will in many instances never become available, inasmuch as—largely because of the transient nature of much construction business [21]—many contractors and subcontractors maintain neither offices nor permanent records. Indeed, even if those conditions were absent, generalized statements that there has been compliance would not give enforcement personnel even the beginnings of a basis for further investigation. In short, it appears that enforcement of the Act would be in serious jeopardy if the new regulations were to be substituted for the present practice.[22]

For these reasons, the Court concludes that, on the basis of the statutory language and its purpose alone, plaintiffs have demonstrated a strong likelihood of success with respect to the Copeland Act regulations.

III

As seen in the necessary brief survey *supra*, it is clear, at a minimum, that the language and history of the two laws lend at least as much support to plaintiffs' position as to the Secretary's, and that with respect to several of the provisions only the construction advanced by the former is consistent with the statute. With the case in that posture, the Court may look appropriately for guid-

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Senate Committee on Labor and Human Resources, S. 1319, 96th Cong., 1st Sess., pp. 277-79 (July 17-19, 1979); Hearings on S. 3061, before the Subcommittee on Federal Spending Practices and Open Government of the Senate Committee on Government Affairs, 96th Cong., 1st Sess., p. 147 (1979).

[21] Often, workers are hired on a daily basis and they are paid in cash.

[22] Present practice does not require contractors to generate records solely for purposes of the Copeland Act. A contractor will be in full compliance simply by providing duplicates of their payroll records which he must maintain in any event to comply with the Fair Labor Standards Act. See 29 C.F.R. § 5.16.

ance to administrative interpretation and practice. That interpretation and that practice reveal the following.

Administrative construction that was contemporaneous with the adoption of the Davis-Bacon Act conclusively supports the views espoused here by the plaintiffs in every significant respect.[23] Those who knew best what Congress intended—the administrators who issued interpretative regulations within a short period after the enactment of the statute, sometimes within days—fully support by their actions the arguments made by the plaintiffs regarding congressional intent and the inferences they ask the Court to draw with respect to the meaning of these laws. On that basis alone, it would be difficult to escape the conclusion that the statutes should be so interpreted. See, *e.g.*, *FTC* v. *Mandel Bros.*, 359 U.S. 385, 391 (1959).

That is not all. For forty-seven years thereafter, through the administrations of eight Presidents[24] and fifteen Secretaries of Labor[25] of many political and ideological persuasions, those interpretations and those regulations stood without substantive alteration. During that period none of the administrators effected the kinds of fundamental changes that are brought about by the regulations adopted two months ago; instead, the various Secretaries of Labor continued to interpret and enforce the laws precisely in accordance with the original understanding. Nor can this stability and consistency in construction by those charged with the laws' enforcement be attributed to inattention, oversight, or neglect (as is

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[23] The Secretary has made no substantial effort to contest that conclusion.

[24] Presidents Roosevelt, Truman, Eisenhower, Kennedy, Johnson, Nixon, Ford, and Carter.

[25] Secretaries Doak, Perkins, Schwellenbach, Moses, Tobin, Durkin, Mitchell, Goldberg, Wirtz, Shultz, Hodgson, Brennan, Dunlop, Usery, and Marshall.

sometimes true when relatively obscure laws or regulations are involved). The Davis-Bacon Act is and always has been a well-known law, affecting millions of employers and wage-earners throughout the United States, and it has frequently been the subject of political and other controversy.

Such consistent, unwavering administrative construction must be accorded very substantial weight by the Court. See, *e.g.*, *Norwegian Nitrogen Co.* v. *United States*, 288 U.S. 294 (1933); *United States* v. *Leslie Salt Co.*, 350 U.S. 383, 396 (1956); *Andrus* v. *Shell Oil Co.*, 446 U.S. 657, 673 n. 12 (1980). Justice Cardozo's statement in *Norwegian Nitrogen* is particularly apt:

> . . . administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful . . . . The practice has peculiar weight when it involves a contemporaneous construction by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.

288 U.S. at 315.

The Secretary's reply is that an agency is not bound to adhere to prior erroneous practice for all time but may make adjustments and changes in the light of its expertise and experience. That principle is unexceptionable in the abstract, but it is also more directly applicable to the exercise of broad public interest-type discretion than it is to actions which are essentially exercises in statutory construction.[26] Moreover, the Secretary's prin-

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[26] For that reason, the decisions on which the Secretary relies are not apposite here. In *New Castle* v. *CAB*, 371 F.2d 733 (D.C. Cir. 1966), the court was dealing with a statute which left to the agency broad authority to regulate in the public interest. Under such circumstances, indicated the court, the agency is not precluded

ciple does not seem to have been successfully pleaded in the past to defeat interpretations and administrative practices as open and consistent as those revealed by this record.[27] See *Baltimore & Annapolis R. Co.* v. *WMATA*, 642 F.2d 1365 (D.C. Cir. 1980), where the court referred to the fact that the agency attempted to overturn the position taken in "an order issued only a few years after an enactment of the [statute] and allowed to stand without challenge or contradiction for more than twelve years." Under these circumstances, said the court, it would not be justified in merely deferring to the agency's conclusion but would make an independent judgment, examining the agency's conclusions with "more exacting vigilance" than would otherwise be employed. 642 F.2d at 1371.

In any event, when an agency abruptly changes a long-standing administrative position, regardless of the context, it may be expected at a minimum to show that the earlier understanding of the statute was wrong or that

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from effecting changes in furtherance of a new philosophy. *Office of Communications of United Church of Christ* v. *FCC*, 590 F.2d 1062 (D.C. Cir. 1978), which is the other case cited, is to the same effect, the court using such language as "open-ended provisions" and "discretion to strike a balance." 590 F.2d at 1068. Here the Secretary does not claim to be acting on the basis of a new philosophy; he asserts that he is merely implementing the congressional purpose on the basis of improved experience and expertise.

[27] Likewise inapplicable is the line of cases cited by the Secretary which exempts wage determinations made by the Department of Labor from judicial review. See, *e.g.*, *United States* v. *Binghamton Construction Co., Inc.*, 347 U.S. 171 (1954); *Universities Research Association, Inc.* v. *Coutou, supra*, 450 U.S. 754 (1981). These decisions all concern specific, individual wage determinations, not broad regulatory changes. Indeed, a number of decisions hold that general rules are *not* immune from judicial scrutiny. See *Commonwealth of Virginia* v. *Marshall*, 599 F.2d 588, 592 (4th Cir. 1980); *North Georgia Bldg. & Const. Trades* v. *Goldschmidt*, 621 F.2d 697 (5th Cir. 1980).

experience has proved it to be defective.[28] As indicated *supra*, the Secretary has done neither; his primary reliance throughout has been on cost and cost savings—matters neither of novel experience nor of special expertise, but well known to and considered by the Congress as early as 1931.

The basic purpose of the Davis-Bacon Act is to protect the wages of construction workers even if the effect is to increase the costs of construction to the federal government. In 1931 and 1935—notwithstanding such opposition as that of President Hoover who cited a "great increase in expense to the taxpayer" as one of his principal grounds[29]—the wage-floor philosophy prevailed over that which regarded low cost to the government as the prime consideration. The Congress enacted the statute which embodies that philosophy; it later further strengthened that law; and it never repealed, modified, or weakened it in any way.

It is not for the Court to judge whether the basic policy decision to prefer wage floors over expense to the government was or is wise. More to the point, it is not for the Secretary of Labor or his subordinates to make that judgment. Under our constitutional system, policy decisions are not made by government administrators; they are made by the Congress. In this instance Congress made its decision, first in 1935 by the enactment of the Davis-Bacon Act, and then again in the forty-seven years since that time by the failure and refusal of succeeding Congresses either to change the law or to suggest that in all these years it had been improperly interpreted and applied.

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[28] See *Greater Boston Television Corporation* v. *FCC*, 444 F.2d 841 (D.C. Cir. 1970); *Columbia Broadcasting System, Inc.* v. *FCC*, 454 F.2d 1018, 1026 (D.C. Cir. 1971).

[29] *The Legislative History of the Davis-Bacon Act*, House Committee on Education and Labor, September 1962, p. 13.

For these reasons, the Court finds that plaintiffs have shown a strong likelihood of success on the merits.[30]

IV

The balance of interests and injuries likewise weighs heavily in favor of plaintiffs.

Some 600,000 contracts subject to the Davis-Bacon Act or related statutes appear to be in force at any one time, and approximately $43 billion is spent annually for construction work covered by these statutes. These construction projects are governed by complicated sets of procedures, including proposals, evaluations, reviews, bids, and contracts clauses, with labor standards requirements interwoven throughout.[31] It is obvious that substantial confusion would result if contracts were bid under the new regulations and these regulations were at some future date declared to be invalid. This would harm not only the employees whose wages would be reduced in the interim but also the employers who would be confronted with an almost impenetrable maze of changes and recomputations. The public would likewise be injured, for it would hardly benefit from the disruption of the contracting process that would inevitably follow from a change in the status quo before the legality of the regulations had been determined with finality.

There is no comparably urgent need for allowing the regulations to become effective immediately. All con-

[30] This does not mean that the Court has concluded that every one of the provisions at issue in this lawsuit will ultimately be found to be unauthorized by the statute and hence invalid. Notwithstanding the general infirmity stemming from the Secretary's departure from contemporaneous and consistent administrative interpretation, it may be that, on the merits, it will be found that the Secretary has sufficient latitude under the statute with respect to one or more of the regulatory provisions to adopt his current construction.

[31] Plaintiffs have suggested that some fifty-eight substantive laws enacted by the Congress include Davis-Bacon Act standards.

cerned have lived under the old regulations and interpretations for well over forty years. Two and one-half years have passed since the effort to change the regulations was begun. An additional period of delay while the legality of the regulations is judicially determined with finality cannot significantly harm either the government or others.[32] The Secretary relies on an affidavit from the Administrator of the Wage and Hour Division in support of his claim of immediate and irreparable harm. But this affidavit in the main demonstrates only that internal administrative *preparations* have been made for implementation of the new regulations[33]—not that anything has been done that cannot easily be undone or that cannot be used at a later date in the event the regulations are subsequently declared to be valid.

The Secretary points to the cost to the government from a delay in enforcement, the obvious premise being that construction can be achieved more cheaply under the new regulations than under the old. In response it may be observed, once again, that this is a cost that is inherent in the policy decision Congress made in 1935 and maintained for the past forty-seven years. Beyond that, costs to the government are not the only ones to be considered on a balance of the injuries and the equities.

Several categories of persons will suffer significant injury if the new regulation is improvidently permitted to take effect notwithstanding its apparent invalidity, as follows. First, those now employed under construc-

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[32] For that reason, this case is unlike *Metzenbaum* v. *Edwards*, 510 F. Supp. 609 (D.D.C. 1981), where this Court refused to issue a preliminary injunction against enforcement of President Reagan's oil decontrol order. That injunction was sought several weeks after decontrol had already occurred and the industry had adjusted to its terms.

[33] The affidavit is studded with phrases indicating that instructions, analyses, or memoranda "are being prepared [or] revised [or] conducted . . . ."

tion contracts governed by the current regulations will, under the new regulations, be forced to accept lower wages—a change for which they will have no legal avenue of redress. Second, either journeymen craft employees are likely to be replaced by helpers or they will be forced to work at helper wages if they wish to work at all. Third, union contractors who are parties to collective bargaining agreements will be squeezed out of the procurement process by contractors who are able to make lower bids under the new regulations. Non of these injuries is likely to be remediable in the event that it is ultimately decided on the merits that the regulations are invalid.

The Court concludes that, upon a balancing of the harm to the plaintiffs, the defendants, and the public, from either a denial or a grant of an injunction, and taking into account the likelihood that plaintiffs will succeed on the merits, it is appropriate that a preliminary injunction issue.

V

For the reasons stated, it is this 22nd day of July, 1982,

ORDERED That defendant Secretary of Labor Ray Donovan and all officers, agents, and employees under his direction and control be and they are hereby enjoined and restrained from administering, enforcing, or giving any force and effect to the regulations published in the Federal Register on May 28, 1982, implementing the Davis-Bacon Act and its related statutes (47 Fed. Reg. 23644-23676) to be codified as 29 C.F.R. §§ 1.2(a), 1.3, 1.7(b) and (d); 29 C.F.R. §§ 5.2(n)(4), 5.5(a)(1)(ii)(A) and (B), 5.5(a)(3)(ii) and (III), and 5.5(a)(4)(iv); and 29 C.F.R. § 3.3(b)), pending final disposition of this action.

/s/ Harold H. Greene
HAROLD H. GREENE
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-1631

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, *et al.*,
Plaintiffs,

v.

RAYMOND J. DONOVAN, *et al.*,
Defendants.

Filed Dec. 23, 1982

MEMORANDUM

On July 22, 1982, the Court issued a preliminary injunction restraining the enforcement of certain regulations which the Secretary of Labor had issued ostensibly in implementation of the Davis-Bacon Act, 40 U.S.C. § 276a *et seq.*, and the Copeland Anti-Kickback Act, 40 U.S.C. § 2776c. The same matter is now before the Court on the parties'[1] cross motions for summary judgment.

The order granting the preliminary injunction was accompanied by a Memorandum which discusses the various regulations and the issues of this lawsuit at some length and, except for certain specific matters, no useful purposes would be served by plowing over the same ground once again in similar or greater detail.

Briefly, the July 22 Memorandum expressed the Court's view that the statutory language and the legislative history regarding the basis for the five types of regula-

[1] The Court permitted the Associated Builders and Contractors to file briefs as *amicus curiae* in support of the position of the Secretary of Labor.

tions at issue was somewhat ambiguous, with language and history supporting the Secretary's interpretation more strongly with respect to some of the regulations and less strongly with respect to others. The Court ultimately resolved the doubts for preliminary injunction purposes in favor of the plaintiffs because each of the regulations issued by the present Secretary of Labor is wholly inconsistent with administrative interpretation contemporaneous with the enactment of the statutes about 1935 and consistent administrative practice since then. See generally *Norweigan Nitrogen Co.* v. *United States*, 288 U.S. 294 (1933). The Court will now simply add the following to what was said on July 22, 1982.

First. Nothing substantially new has been adduced by the parties or the *amicus* or found by the Court with respect to three of the challenged regulations.

a. The Act directs the Secretary, in his ascertainment of the prevailing wage, to determine wages for "projects of a character similar to contract work." 40 U.S.C. § 276(a). As the Court previously pointed out, administrative practice from the early 1930s on has been to consider both private and public projects in ascertaining the appropriate standard for ascertaining the prevailing wage. The present Secretary's attempt to alter this consistent practice[2] is based essentially on nothing more than his policy difference with the preceding fifteen Secretaries of Labor. That is not enough. See Memorandum of July 22 at pp. 12-14.

b. The next point of dispute centers around the question whether, in setting prevailing wage rates for rural areas, the Secretary may consider the wages being paid in nearby metropolitan areas. As the Court previously indicated, the legislative history of this provision is mixed, but here, too, the ambiguities are fully resolved

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[2] This consistent administrative practice was well known to the Congress, but it was never overruled by that body.

by contemporaneous and consistent administrative practice against the construction adopted by the present Secretary.

c. The Copeland Act requires the Secretary to issue regulations for federal contractors which, *inter alia*, require such contractors to "furnish weekly a statement with respect to the wages paid each employee during the preceding week." Secretaries of Labor have always construed this provision to mean that copies of the actual weekly payroll must be submitted. The regulations issued by the present Secretary, however, would require only a statement from the contractor that he had complied with the Act. The new regulation suffers not only from the same infirmity as the others referred to above —that it is contrary to consistent, long-standing administrative practice—but it is also subject to the additional criticism that it would render the Act largely unenforceable. See pp. 10-11 of the Memorandum of July 22, 1982.

Second. The Davis-Bacon Act provides that every federal construction contract shall contain a provision to the effect that the minimum wages being paid to various classes of laborers and mechanics shall be those determined by the Secretary "to be prevailing" for corresponding classes of laborers and mechanics. The existing regulations define "prevailing wage" as the wages being paid to at least thirty percent of those so employed. The new regulations issued by the present Secretary and temporarily enjoined by the Court would change this standard to provide in essence that a wage shall be deemed prevailing only if it is paid to a majority (more than fifty percent) of a particular class.

The Act itself does not provide a definition of "prevailing wage," and it is abundantly clear that the definitional task was entirely delegated to the Secretary. There is nothing intrinsically appropriate or inappro-

priate to the thirty percent rule or to any other figure as representing the "prevailing wage." Moreover, the legislative history of the statute and its purposes do not provide support for any particular figure. The statute quite simply relies on the Secretary to give content from time to time to the term "prevailing wage" in the exercise of his discretion and his expertise. There is no indication that Congress intended the first Secretary of Labor following enactment of the law to define the definition of prevailing wage for all time. To the contrary, contemporaneous and subsequent legislative materials indicate that Congress was fully aware tht the definition might or would be adjusted depending on existing conditions. 74 Cong. Rec. 6516 (Feb. 28, 1931); 74 Cong. Rec. 12365 (June 8, 1932); Hearings before Senate Committee on Labor and Human Resources on Military Construction Authorization Act of 1980, 96th Cong., 1st Sess. at 363 (1979).

In view of the background, which differs significantly from that of the other regulations at issue here, the Court concludes that, notwithstanding prior administrative practice, it was not improper for the Secretary to substitute the fifty percent standard for the earlier thirty percent standard. Accordingly, the Court will not enjoin that part of the new regulation which sets the prevailing wage as the wage paid to the majority (more than 50 percent) of the various classes of laborers and mechanics.

Third. The post-argument briefs, including particularly that of the *amicus*, focus on the "helper" issue. In its Memorandum of July 22, 1982, the Court expressed the view that the various regulations which would permit a substantial increase in the number of "helpers" in the construction industry probably did not reflect the will of the Congress. The Associated Builders and Contractors argue with considerable vigor that the Secretary's revisions of the "helper" regulations are correct. In this

regard, the *amicus* points to an alleged statutory mandate to establish classifications by regulation that would mirror actual practice; that the scope and significance of the helper category has expanded dramatically in recent years (particularly in non-union shops); and that the helper classification promotes employee opportunity. These arguments proceed from erroneous premises and they are insufficient to overcome the conclusions to be drawn from the basic legislative purpose.

The crux of the matter is this. The integrity of the statutory scheme requires that each "class of laborers and mechanics" be comprised of "members" who perform "well-defined tasks" and do not perform traditional craft work of another, higher paid class. This is a fundamental principle with which apparently neither the Secretary of Labor nor the *amicus* quarrel, at least not in theory. Indeed, the *amicus* argues that the Secretary's definition of "helper" will maintain "the stict lines of demarcation between skilled and unskilled labor.' *Memorandum* at p. 15. But in practice that distinction can be maintained only if the tasks of the helper class are defined as discrete and distinguishable from those of laborers and mechanics.

Yet the new regulations would allow helpers to substitute for laborers and for journeymen, and that helpers would be allowed to perform tasks of all sorts. Under these regulations, "helpers" would *not* be performing well-defined tasks, either with regard to type of skill or to amount of experience, but they would be available in a general way to substitute for workers of many types and many levels of experience.[3]

The *amicus* suggests that any problems in this regard are remedies by the provision in the regulation which

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[3] The legislative history indicates that when "actual practice" may be equated with a practice to evade the prevailing wage requirement it is not determinative. Cong. Rec. Senate, p. 12073, July 30, 1935.

forbids contractors to pay reduced rates for work "properly performed" by classes other than helpers (Memorandum, p. 17). However, since the entity which will determine whether a particular task is "properly performed" by a helper or by a skilled person will be the contractor, it may reasonably be assumed that his determination will follow his self-interest: lower-paid helpers will be regarded as properly performing many tasks traditionally beyond their competence. When Congress enacted the Davis-Bacon Act, it was well aware of these practicalities (see, *e.g.*, Cong. Rec. Senate, p. 12073 (July 30, 1935)) and it sought to guard against them. It is quite clear that the new regulation would subvert the congressional will.[4]

Despite its seeming complexity, the basic issue governing this lawsuit is relatively simple. Congress enacted the Davis-Bacon Act and the Copeland Act in the 1930s with certain purposes in mind. Regulations were issued very shortly following the enactments to implement the words and purposes of the legislature. In spite of substantial public debate concerning both the laws and the regulations in the years since then, the Congress has not amended the law and it has not expressed its displeasure with the regulations. Morevoer, fifteen Secretaries of Labor serving under eight Presidents have never altered the regulatory scheme. The present Secretary's claim to have discovered a wholly different congressional intent rings hollow in the light of that history.

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[4] As for the argument of the *amicus* that increased use of the helper classification promotes employee opportunity, it appears that as of 1978 minority participation in joint union-management apprenticeship programs was 21.2 percent while its participation in open-shop trading programs was only 11.4 percent. Department of Labor data tabulated for Union and Open Shop Construction, p. 72 (1978). The regulation adopted by the present Secretary is likely to have the effect of allowing contractors to replace higher wage minority laborers with lower wage minority helpers.

For the reasons stated, the Court this day permanently enjoins the enforcement of all the new regulations at issue here, with the sole exception of the regulation which defines the prevailing wage in terms of a higher percentage of employees in each class of laborers and mechanics than was provided for heretofore.

/s/ Harold H. Greene
HAROLD H. GREENE
United States District Judge

Dated: December 23, 1982

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-1631

BUILDING AND CONSTRUCTION TRADES' DEPARTMENT, AFL-CIO, *et al.*,

Plaintiffs,

v.

RAYMOND J. DONOVAN, *et al.*,

Defendants.

[Filed Dec. 23, 1982]

ORDER

Upon consideration of the various briefs and memoranda submitted by the parties and the amicus, the oral argument, and the entire record herein, it is this 23rd day of December, 1982,

ORDERED That, with the exception noted below, plaintiffs' motion for summary judgment be and it is hereby granted, and defendants' motion for summary judgment be and it is hereby denied; and it is further

ORDERED That the regulations published in the Federal Register by the Secretary of Labor on May 28, 1982 (revisions to C.F.R. Parts 1 and 5) allegedly in implementation of the Davis-Bacon Act, 40 U.S.C. § 276a *et seq.*, and the Copeland Anti-Kickback Act, 40 U.S.C. § 276c, be and they are hereby declared invalid with the exception of the regulation redefining the "prevailing wage" (47 Fed. Reg. 23,652 (1982), codified in 29 C.F.R. § 1.2(a)(1)), and it is further

ORDERED That the defendants, their agents and employees, and all those acting pursuant to their direction or in concert with them be and they are hereby permanently enjoined from enforcing or giving any effect to such regulations, including 47 Fed. Reg. 23652, 23654-55, 23668, 23679, codified in 29 C.F.R. §§ 1.3(d), 1.7(b), 1.7(d), 55(a).

/s/ Harold H. Greene
HAROLD H. GREENE
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-1631

BUILDING AND CONSTRUCTION TRADES' DEPARTMENT, AFL-CIO, *et al.*,

Plaintiffs,

v.

RAYMOND J. DONOVAN, *et al.*,

Defendants.

[Filed Jan. 17, 1983]

ORDER

Upon consideration of Defendants' Motion to Amend Judgment, the materials submitted by the parties and the entire record herein, it is, this 17th day of January, 1983

ORDERED that the Order of this Court filed December 23, 1982 is amended as follows:

The regulations published in the Federal Register by the Secretary of Labor on May 28, 1982 concerning the Davis-Bacon Act and the Copeland Anti-Kickback Act herein declared invalid and enjoined are the following and none others:

1. 29 C.F.R. Section 1.3(d), published at 47 Fed. Reg. 23,652 (exclusion of Davis-Bacon construction in wage determinations)

2. 29 C.F.R. Section 1.7(d), published at 47 Fed. Reg. 23,655 (exclusion of metropolitan data in wage determinations)

3. 29 C.F.R. Section 1.7(d), published at 47 Fed. Reg. 23,655 (helpers)

4. 29 C.F.R. Section 5.2(n)(4), published at 47 Fed. Reg. 23,667 (helpers)

5. 29 U.S.C. Section 5.5(a)(1)(ii)(A), published at 47 Fed. Reg. 23,668 (helpers)

6. 29 C.F.R. Section 5.5(a)(4)(iv), published at 47 Fed. Reg. 23,670 (helpers)

7. 29 C.F.R. Section 5.5(a)(3)(ii), published at 47 Fed. Reg. 23,669 (Copeland Act requirements)

8. 29 C.F.R. Section 3.3(b), published at 47 Fed. Reg. 23,679 (Copeland Act requirements)

9. 29 C.F.R. Section 5.6(a)(2) and (3), published at 47 Fed. Reg. 23,671 (Copeland Act requirements)

The regulations published May 28, 1982 other than the nine itemized above are not declared invalid or enjoined.

/s/ Harold H. Greene
United States District Judge

No. 83-697

In the Supreme Court of the United States

OCTOBER TERM, 1983

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, ET AL., PETITIONERS

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the revised regulations issued by the Secretary of Labor under the Davis-Bacon Act, 40 U.S.C. 276a *et seq.*, are within his discretion to determine the "prevailing wage" for federal and federally-assisted construction projects.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-44a) is reported at 712 F.2d 611. The opinion of the district court granting a preliminary injunction (Pet. App. 49a-67a) is reported at 543 F. Supp. 1282. The opinion of the district court granting a permanent injunction (Pet. App. 68a-74a) is reported at 553 F. Supp. 352.

JURISDICTION

The judgment of the court of appeals was entered on July 5, 1983. A petition for rehearing was denied

on September 16, 1983 (Pet. App. 46a-47a). The petition for a writ of certiorari was filed on October 26, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Davis-Bacon Act, 40 U.S.C. 276a *et seq.*, guarantees wages based on locally prevailing rates to construction workers under contracts with the United States or the District of Columbia. The Act, first adopted in 1931 and substantially revised in 1935, provides (40 U.S.C. 276a(a)) that all such contracts for construction of public buildings or public works with a cost in excess of $2,000:

> shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State, in which the work is to be performed * * *.

Since 1935, Congress has extended the Act's prevailing wage requirements by statute to many other federal and federally-assisted construction programs, generally by requiring payment of wages determined in accordance with the Davis-Bacon Act.[1]

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[1] See, *e.g.*, the Housing and Urban Development Act of 1965, 42 U.S.C. 3107; the Elementary and Secondary Education Act of 1965, 20 U.S.C. 1232b; the Federal-Aid Highway Act, 23 U.S.C. 113; and the Urban Mass Transportation Act of 1964, 49 U.S.C. 1609. A list of statutes incorporating Davis-Bacon provisions can be found at 29 C.F.R. Pt. 1 App. A.

The Act requires that the locally prevailing wage for each class of laborers or mechanics be "determined by the Secretary." 40 U.S.C. 276a. In fulfilling this responsibility, the Secretary has since 1934 issued regulations to implement the Act. These regulations, inter alia, provide a formula for calculating the prevailing wage, indicate the type of raw wage data that the Secretary will use in making those calculations, state the procedures for making individual wage determinations, and detail enforcement procedures. See 29 C.F.R. Pts. 1 and 5.

2. On August 14, 1981, the Secretary published a proposed revision of the Davis-Bacon Act regulations. 46 Fed. Reg. 41443-41470. During the 60-day comment period that followed, the Secretary received approximately 2,200 comments representing the views of Members of Congress, state and local government officials, contracting agencies, unions, contractors, and academics. See 47 Fed. Reg. 23644 (1982). The comments and the economic studies included in the record fill nine volumes totalling 4,245 pages. The Secretary published new final rules on May 28, 1982, with a scheduled effective date of July 27, 1982. 47 Fed. Reg. 23643-23679. No procedural challenge to the regulations has been made.

Four changes made by the May 1982 regulations are at issue in this case: [2]

(a) *Formula for Prevailing Wage.* The Secretary must determine a single "prevailing" wage for each class of workers employed on similar projects in the locality in which a federal project is being con-

[2] The district court invalidated a fifth change made by the new regulations, concerning the weekly reporting requirement as to wages paid, and the court of appeals affirmed that holding. Pet. App. 39a-44a.

structed. This prevailing wage is then incorporated in each covered contract. Since workers within each class typically receive a range of wage rates, the Secretary must use a statistical method to determine a single "prevailing" rate for each class. Under the new regulations, a two step formula is used. First, if a single rate is paid to a majority of workers in the class, that rate is deemed prevailing. Second, if there is no majority rate, then the weighted average of the wage rates paid is deemed to be prevailing. Section 1.2(a)(1), 47 Fed. Reg. 23652 (1982). Under the prior regulations, the same formula applied, except that, as an additional middle step in the formula, where no single rate was paid to a majority of workers any rate paid to at least 30% of the workers would be deemed "prevailing." See 29 C.F.R. 1.2(a) (1982).

(b) *Metropolitan Data in Rural Areas.* The Act requires the Secretary to set a separate prevailing wage for each "city, town, village, or other civil subdivision of the State" where covered work takes place. Normally, the Secretary uses the county as the local geographic unit. See Section 1.7(a), 47 Fed. Reg. 23654 (1982). But some rural counties do not have enough recent construction upon which to base wage determinations for each type of construction. When this is the case, the new regulations provide:

> Wages paid on similar construction in surrounding counties may be considered, *provided* that projects in metropolitan counties may not be used as a source of data for a wage determination in a rural county and [vice versa].

Section 1.7(b), 47 Fed. Reg. 23655 (1982) (emphasis in original). The old regulations did not specifically address the issue of metropolitan and rural data (see 29 C.F.R. 1.8(b) (1982)), but the Department's

1979 Construction Wage Determination Manual did provide that "'[*g*]*enerally*, a metropolitan county should not be used to obtain data for a rural county (or visa [*sic*] versa)'" (Pet. App. 15a (emphasis added; brackets in original) (quoting J.A. 10)).

(c) *Exclusion from Wage Surveys of Prior Projects Subject to Davis-Bacon.* Under the new regulations, when the Secretary compiles wage rate data for two of the four general types of construction—building and residential [3]—he "will not use data from Federal or federally-assisted projects subject to Davis-Bacon prevailing wage requirements unless it is determined that there is insufficient wage data to determine the prevailing wages in the absence of such data." Section 1.3(d), 47 Fed. Reg. 23652 (1982). In the past, projects subject to the Act were included in the surveys.

(d) *Helpers.* The May 1982 regulations recognize a class of workers, known as helpers, that was infrequently permitted on Davis-Bacon projects in the past. A helper is defined by the new regulations as:

> a semi-skilled worker (rather than a skilled journeyman mechanic) who works under the direction of and assists a journeyman. Under the journeyman's direction and supervision, the helper performs a variety of duties to assist the journeyman such as preparing, carrying and furnishing materials, tools, equipment, and supplies and maintaining them in order; cleaning and

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[3] "Building construction" generally refers to "'sheltered enclosures with walk-in access'"; "residential construction" includes houses and apartments of no more than four stories. The other two types of construction, which are unaffected by this new regulation, are "highway" and "heavy" (the latter, a catch-all that includes items such as dams, railroads, subways, and canals). See Pet. App. 16a n.3.

> preparing work areas; lifting, positioning, and holding materials or tools; and other related, semi-skilled tasks as directed by the journeyman. A helper may use tools of the trade at and under the direction and supervision of the journeyman. The particular duties performed by a helper vary according to area practice.

Section 5.2(n)(4), 47 Fed. Reg. 23667 (1982).[4] The other recognized categories of workers are: journeymen, laborers, and apprentices and trainees. While liberalizing the definition of permissible "helpers," the new regulations also limit their use to no more than two helpers for every three journeymen employed on a project. Section 5.5(a)(4)(iv), 47 Fed. Reg. 23670 (1982).

The Secretary explained that the purposes for permitting expanded use of helpers were to reflect the widespread practice in private construction, to expand the pool of contractors available to bid for federal jobs, to save money and increase productivity, and to increase job opportunities for less skilled workers and new entrants into the market, including young people, women, and members of minority groups. 47 Fed. Reg. 23647 (1982).

3. Shortly after publication of the new regulations, petitioner filed suit in the United States District

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[4] If a worker is listed as a helper but does not actually fit this definition, he or she must be paid as a journeyman (or laborer, if appropriate). Section 5.5(a)(4)(iv), 47 Fed. Reg. 23670 (1982).

In addition, the May 1982 regulations provide that a helper classification may be recognized in any locality where the use of helpers is "identifiable." Section 1.7(d), 47 Fed. Reg. 23655 (1982). The court of appeals held that this provision was contrary to the Act and that, as a general matter, a helper classification may be recognized only where the use of helpers is a "prevailing" local practice (Pet. App. 26a-29a).

Court for the District of Columbia, seeking to enjoin their implementation. On July 22, 1982, five days before their effective date, the district court issued a preliminary injunction restraining all of the challenged changes (Pet. App. 49a-67a). The court issued a permanent injunction on December 23, 1982, as to all but one of the changes (*id.* at 68a-74a). The court explained that "the statutory language and the legislative history regarding the basis for the five types of regulations at issue [are] somewhat ambiguous, with language and history supporting the Secretary's interpretation more strongly with respect to some of the regulations and less strongly with respect to others" (*id.* at 68a-69a). The court upheld the new formula for calculating the prevailing wage because "[t]he Act itself does not provide a definition of 'prevailing wage,' and it is abundantly clear that the definitional task was entirely delegated to the Secretary" (*id.* at 70a). As to the other revisions, the court "ultimately resolved the doubts * * * in favor of the [petitioners]." In its view, "each of the regulations issued by the present Secretary of Labor is wholly inconsistent with administrative interpretation contemporaneous with the enactment of the statutes about 1935 and consistent administrative practice since then." *Id.* at 69a.

4. The court of appeals upheld all four of the regulations at issue (Pet. App. 1a-44a).[5] Relying on

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[5] As indicated at page 3 note 2, *supra*, and page 6 note 4, *supra*, the court of appeals held invalid a regulation concerning the weekly reporting requirement as to wages paid, and part of another regulation, allowing recognition of helpers where that practice is "identifiable" rather than "prevailing." We have not sought review of those rulings.

Batterton v. *Francis*, 432 U.S. 416 (1977), the court found that because "the statute empowers the Secretary to adopt 'regulations with legislative effect,' " its "task is limited to ensuring that the new definition is not one 'that bears no relationship to any recognized concept of [the statutory term] or that would defeat the purpose of the [statutory] program' " (Pet. App. 10a (brackets in original) (quoting *Batterton*, 432 U.S. at 425, 428)). As to each of the regulations, the court concluded from the statutory language and the legislative history that Congress had granted sufficient discretion to the Secretary to select any one of numerous approaches, including the one actually adopted. The court concluded that "the statute delegates to the Secretary, in the broadest terms imaginable, the authority to determine which wages are prevailing" (Pet. App. 9a). Thus, as to the formula for calculating the prevailing wage, the court upheld the new definition of "prevailing" because it "is within a common and reasonable reading of the term" (*id.* at 10a).

On the exclusion of urban counties from rural wage determinations, the court of appeals explained that the literal language of the Act "would appear to refer the Secretary only to projects in the same civil subdivision" where the project is to be built, but that Congress understood that the Secretary had the power to go beyond the civil subdivision in rural areas where there is little construction (Pet. App. 11a-12a). "In essence, Congress anticipated that the general authorization to the Secretary to set the prevailing wage would encompass the power to find a way to do so in the interstitial areas not specifically provided for in the statute" (*id.* at 13a). The court found that the new regulation is "rational and furthers the purposes of the statute" (*id.* at 14a).

Similarly, the court of appeals found "substantial evidence in the legislative history and, more importantly, in the premises of the Act, that suggests that Congress did not intend wages on federal projects to be considered at all" in surveys of wages used for calculating the prevailing wage (Pet. App. 17a). Federal wages were to be set by reference to wages in private construction. During the 1930s, however, there was insufficient private construction to establish a base. Therefore, the Secretary "exercised his discretion to include these [federal] projects as a necessary expedient during the Depression in order to achieve the ends of Congress" (*id.* at 21a). Now that conditions had changed, the court reasoned, the Secretary has the "power to fine tune his exercise of discretion" (*ibid.*).

The court of appeals explained that the regulation recognizing a wider scope for helpers "would no longer define the 'classes' of laborers and mechanics by the tasks a particular employee does, but rather in large part by whether he or she is acting under the supervision of a journeyman" (Pet. App. 30a). While the court acknowledged some statements in the 1935 legislative history suggesting that Congress considered classes as defined by task, it concluded that Congress had not "intended to bind the Secretary to the job classification existing at the time, but rather merely spoke against a background of the task-based union practice being the prevailing one" (*id.* at 32a). Those statements, the court reasoned, do not "vitiate the clearly expressed congressional purpose to have federal wages mirror those prevailing in the area" (*id.* at 35a). The court noted that the use of helpers is widespread in private industry today (*id.* at 24a), and concluded that the Secretary's action "is an en-

tirely logical response to the problem of federal construction practice not reflecting the widespread, but not universal, practice of using helpers" (*id.* at 38a).

In reaching its conclusions, the court of appeals stressed that the district court was wrong to rely so heavily on past administrative practice. The court of appeals stated:

> [T]he Secretary was acting in an area as to which he had some discretion to reach a number of different results rather than an area of pure statutory interpretation as to which there is in theory only a single answer. As the District Court recognized, *see* 543 F. Supp. at 1290, prior administrative practice carries much less weight when reviewing an action taken in the area of discretion, when little more than clear statement is required, than when reviewing an action in the field of interpretation, where it is thought that the agency's contemporaneous and consistent interpretation of one of its enabling statutes is reliable evidence of what Congress intended.

Pet. App. 15a-16a.[6]

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[6] On October 4, 1983, the court of appeals stayed issuance of its mandate until October 26, 1983 (Pet. App. 48a). Petitioners filed their petition for a writ of certiorari on the latter date. The regulatory changes enjoined by the district court therefore have not taken effect. See Fed. R. App. P. 41(b). The change in the formula for computing the "prevailing wage" went into effect as of June 28, 1983, after being upheld by the district court. See 48 Fed. Reg. 19532 (1983).

ARGUMENT

The court of appeals applied settled principles of judicial review of agency rulemaking, and carefully examined relevant legislative and administrative history, in sustaining the Secretary's actions in part and overturning them in part. The court's interpretation of the scope of administrative discretion under the Davis-Bacon Act conflicts with no other judicial decision, and warrants no further review by this Court.

1. The Davis-Bacon Act requires that wages on covered projects be "based upon the wages that will be determined by the Secretary of Labor to be prevailing" for corresponding classes of workers on similar projects in the locality. 40 U.S.C. 276a(a). Under this "explicit delegation of substantive authority" (*Schweiker* v. *Gray Panthers*, 453 U.S. 34, 44 (1981)), the Secretary's rules are " 'entitled to more than mere deference or weight.' " They are "entitled to 'legislative effect.' " *Ibid.* (quoting *Batterton* v. *Francis*, 432 U.S. 416, 425, 426 (1977)). Indeed, the key statutory language delegating regulatory authority under the Davis-Bacon Act—"determined by the Secretary"—is virtually identical to that under consideration in *Gray Panthers* and *Batterton*.[7] The term "prevailing wage" is not subject to a single correct interpretation, any more than was the term "available" at issue in *Gray Panthers* or the term

[7] Petitioners attempt to distinguish *Batterton* on the ground that in *Batterton* Congress "authorized the HEW Secretary to establish *standards* according to which the states were to determine claimants' 'unemployment' status in particular cases" (Pet. 11 n.2 (emphasis in original)). However, it is not significant that in *Batterton* the Secretary established *standards* while under Davis-Bacon the Secretary establishes actual *wage schedules*. The degree of discretion imparted is the same.

"unemployment" at issue in *Batterton;* rather, it sets forth a range of discretion necessarily calling for legislative-type judgments. That is why Congress conferred authority on the Secretary to "determine" its meaning and application. Cf. *Gray Panthers,* 453 U.S. at 43; see Pet. App. 15a. Thus, as this Court has stated, "[a] reviewing court is not free to set aside those regulations simply because it would have interpreted the statute in a different way." *Batterton,* 432 U.S. at 425. The regulations must be allowed to stand unless they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Id.* at 426.

Modifications in extant regulations are subject to the same standard of review. *Motor Vehicle Manufacturers Ass'n* v. *State Farm Mutual Automobile Ins. Co.,* No. 82-354 (June 24, 1983), slip op. 10. Past administrative practice can often be relevant to the analysis of regulatory changes, as the court of appeals acknowledged (Pet. App. 15a-16a, 19a-21a, 36a-37a), but the ultimate legal issue remains the same: is the agency action within the scope of statutory discretion? Even petitioners acknowledge (Pet. 6-7) that "[t]he enabling statute may leave large areas of discretion and contemplate a continual process of adaptation to new circumstances or a careful restudy may persuade that the original regulation is unsound when measured against the statute or has proved defective in operation as a means for carrying out the statute." [8] See *American Trucking*

[8] We cannot agree with petitioners (Pet. 6) that "the reconsideration of regulations * * * pose[s] a substantial threat to the rule of law." Both Congress (5 U.S.C. 610) and the President (Exec. Order No. 12,291, 3 C.F.R. 127 (1981 Comp.) have required agencies to undertake periodic review

Ass'n v. *Atchison, T. & S.F. Ry.*, 387 U.S. 397, 416 (1967) ("we agree that the [agency], faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice").[9]

Petitioners bear a heavy burden of showing that the challenged regulations "bear[] no relationship to any recognized concept of [prevailing wages]," that they "would defeat the purpose of the [Davis-Bacon Act]," or that they are otherwise arbitrary, capricious, or not in accordance with law. *Batterton* v. *Francis*, 432 U.S. at 426, 428. They have not made that showing.

2. Petitioners make no showing whatever as to three of the challenged regulations: the new prevailing wage formula, the ban on use of metropolitan

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of existing regulations to determine whether changes should be made. Indeed, the ability to change course in response to new conditions or new ideas is one of the key advantages of the administrative process.

[9] *Motor Vehicle Manufacturers Ass'n* v. *State Farm Mutual Automobile Ins. Co.*, *supra*, and *BankAmerica Corp.* v. *United States*, No. 81-1487 (June 8, 1983), are not to the contrary. In *State Farm*, the Court adhered to the traditional "arbitrary and capricious" standard of review, striking down the agency's decision to rescind prior regulatory requirements only upon a conclusion that the agency failed to present an adequate basis and explanation for its decision. Slip op. 3. The Court expressly stated that the rescission or modification of an existing regulation is subject to the same standard of review applicable to promulgation of a new regulation. Slip op. 10. *BankAmerica Corp.* did not concern a modification in rules promulgated within the discretion of the agency, but the interpretation of statutory language that had previously been interpreted in one way by Congress, the business community directly affected, and the enforcing agencies for more than 60 years. Slip op. 9.

data in rural areas, or the exclusion of prior Davis-Bacon projects from wage surveys. With respect to these three regulations, petitioners provide a cursory description in the statement of facts and nothing more (Pet. 5). The court of appeals carefully examined the provisions of the Act and the pertinent legislative history as to each of these three regulatory changes. It also carefully examined the reasons stated by the Secretary to explain his revisions, and found them satisfactory (see pages 8-9, 10, *supra*). Nothing in the petition casts any doubt upon the correctness of the court's judgment upholding the Secretary's exercise of discretion.

3. Petitioners focus on the regulatory change permitting expanded use of helpers. They correctly point out (Pet. 15) that the statutory language, as well as the legislative history, indicates that each class of laborers and mechanics for which a wage schedule is to be established should be differentiable. Otherwise, employers could evade wage requirements by misclassifying workers. However, as the court of appeals concluded (Pet. App. 33a), the basis for distinguishing between classes of laborers and mechanics need not be "task-oriented"; nothing in the statute prohibits the Secretary from drawing a distinction—as he has here—on the basis of degree of supervision.

Indeed, the Secretary's revised approach draws powerful support from the central purpose of the Davis-Bacon Act: "to have federal wages mirror those prevailing in the area" (Pet. App. 35a and sources cited therein). To preclude the use of helpers where such use is a "prevailing practice" in the community, as petitioners suggest, would distort the local labor market and skew the wage scale. Petitioners also disregard the other reasons stated by the Sec-

retary for the regulatory change—including increasing job opportunities for less skilled workers, especially young people, women, and members of minority groups now frozen out by restrictive federal requirements limiting the demand for semi-skilled labor, encouraging job training, increasing productivity, and enabling a broader class of contractors to compete for government work. See 47 Fed. Reg. 23651 (1982). Each of these is a legitimate factor to be considered.

Petitioners' apparent argument (Pet. 17)[10] that the use of helpers is flatly inconsistent with the Act itself is without merit. Petitioners do not dispute that some use of helpers has always been permitted by the Secretary. See 47 Fed. Reg. 23647, 23649, 23659 (1982). The regulations at issue merely *expand* the existing helper classification. It is difficult to see how petitioners can argue that the prior regulations, which permitted the use of helpers to a limited extent, were valid, yet assert that the May 1982 regulations are invalid on the ground that they permit the use of helpers. See Pet. App. 30a-32a n.9.

Nor is petitioners' argument supported by the legislative history. Petitioners rely heavily (Pet. 18-21) on selected quotations from the legislative history to support their view that recognition of a helper classification is inconsistent with the statutory purpose. We submit that the court of appeals more accurately summed up the legislative history as containing

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[10] In the district court, petitioners expressly stated that " 'we do not take the position that Congress *precluded* recognition of semiskilled helpers under the Davis-Bacon Act. . . . Quite clearly, the Davis-Bacon Act does allow recognition of semiskilled workers when they do, in fact, represent a prevailing practice and form a *distinguishable* class who perform discrete tasks.' " Pet. App. 32a n.9 (citation omitted; emphasis and deletion in original).

"fairly ambiguous legislative references to a task-based classification system" (Pet. App. 35a). These references, taken in context, do not indicate that "Congress intended to bind the Secretary to the job classification existing at that time, but rather merely spoke against a background of the task-based union practice being the prevailing one" (*id.* at 32a).

During consideration of the 1935 amendments to the Act, Congress criticized the practices then being followed under the 1931 version of the Act, focusing on the fact that employers were creating semi-skilled classifications that did not exist in private industry and were forcing skilled workers into these artificial classes, with their lower rates of pay. Congress may well have considered that classes in private industry were task-based at the time, since union jurisdictional rules are typically task-based,[11] but its underlying concern was that some contractors were disregarding the prevailing practice, whatever it happened to be. It is thus consistent with the 1935 legislative history for the Secretary to change the basis on which he will distinguish classes of workers to mirror the prevailing practice in the industry today. Times change;

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[11] Petitioners complain that the court of appeals gave "controlling significance" to a passage from the legislative history that shows that Congress did not intend for the Act to impose union wage scales on all federal projects (Pet. 20 & n.5). To the contrary, the court only stated that this passage presents "[f]urther evidence" that "suggests" that the court had reached the right conclusion (Pet. App. 34a, 35a). In any event, the court's analysis was valid: the fact that Congress deliberately decided not to require the Secretary to use union wage scales as the standard for the Act is strong evidence that it did not intend to mandate the use of union jurisdictional rules. These matters are left in the sound discretion of the Secretary. See Pet. App. 24a-25a.

labor practices change; regulations may change with them.

At bottom, petitioners' concern seems to be that the revised classification scheme may be more difficult to enforce (Pet. 19). However, as the court of appeals pointed out (Pet. App. 37a), judicial deference to agency decisions "is properly near its greatest" on questions of the relative enforceability of different approaches to administering a statute. Moreover, since the helper classification is commonly used in private construction, there is no reason to suppose that it will prove unworkable on federal projects. See Pet. App. 38a.

4. In sum, Congress determined to solve the problem of underpayment of construction workers on federal projects by legislating certain general concepts under which each class of workers is to be paid no less than the wage prevailing locally for the corresponding class of workers and by giving the Secretary wide discretion to translate those broad concepts into specific minimum wage rates to be incorporated into each covered contract. Each of the four regulations here is consistent with the general concepts of the Act and within the latitude that Congress granted to the Secretary. Accordingly, the court of appeals correctly concluded that the regulations are valid.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 83-697

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Respondents.

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PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

ARGUMENT

The one point on which the parties and the *amici curiae* agree is that this first substantial revision of the original Davis-Bacon regulations promulgated contemporaneously with that Act's passage in 1935 is of great practical consequence to a multibillion dollar government procurement program and to the level of labor standards in construction—the nation's largest industry. That was the Secretary of Labor's stated view in issuing the challenged regulations and in opposing a stay of the Court of Appeals' mandate. See 46 Fed. Reg. 41444 (Aug. 14, 1981); Opposition to Motion to Stay Mandate in C.A.D.C. Nos. 83-1118 etc. p. 4. And those statements are unwittingly confirmed by the filing of two briefs *amicus*

curiae—one by Associated General Contractors of America and the other by the Public Service Research Council —both of which reflect the intense desire of substandard contractors to maintain the economic advantage granted by the challenged regulations and the concern that those regulations could not survive review in this Court under the proper legal standards stated in *Motor Vehicle Mfrs. Ass'n. v. State Farm Mutual*, —— U.S. ——, 51 L.W. 4953 (June 24, 1983). Despite the Secretary's soothing assurances, that concern is well warranted; the attempted defenses of the decision below further confirm that the decision cannot be squared with this Court's precedents.

I.

(a) Like the Court of Appeals' opinion, the Secretary's brief in opposition places heavy emphasis on the proposition that his challenged regulations are properly characterized as "legislative" rules and that such rules are *ipso facto* entitled to special judicial deference. Br. in Opp. 11-13; see also AGC Br. 3-6.[1] But, even if it be assumed that the "legislative" appellation is of critical importance here, that does not justify the Court of Appeals' overly lenient standard of review. This is established by *Motor Vehicle Mfrs.* The airbag and seat belt regulations considered there were quintessentially legislative and were set aside as "arbitrary and capricious" when judged by the very standards applied by the District Court here and emphatically rejected by the Court of Appeals. See especially 51 L.W. at 4956, quoted at Pet. 11-12. That simple fact utterly destroys the claim that changes in leg-

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[1] Throughout this reply: the petition for a writ of certiorari and accompanying appendix will be referred to as "Pet." and "Pet. App." respectively; the brief for the respondents in opposition will be referred to as "Br. in Opp.", the briefs *amicus curiae* of the Associated General Contractors of America, Inc. and of the Public Research Council will be referred to as "AGC Br." and "PSRC Br." respectively; and the respondents will be referred to as "the Secretary."

islative rules are entitled to special judicial deference and confirms that the Court of Appeals in granting such deference proceeded on a mistaken understanding of the judicial role.[2]

(b) The approach of the Court of Appeals is captured in the Secretary's statement that an administrator "may alter [his] past interpretation and overturn past administrative rulings and practice." Br. in Opp. 13, quoting *American Trucking Ass'n v. Atchison, T.S. F. Ry.*, 387 U.S. 397, 416. But that is only half the governing rule; as a later case involving the Santa Fe makes clear, an administrator in exercising that power must justify the alteration and must do so in a manner that overcomes the "*presumption that* [*Congress'*] *policies will be carried*

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[2] The simplistic wordplay by which the Court of Appeals and the Secretary would assimilate the challenged regulations in this case to the legislative rule at issue in *Batterton* v. *Francis*, 432 U.S. 416 is entirely inadequate in its own right. The Secretary says that "the key statutory language delegating regulatory authority under the Davis-Bacon Act—'determined by the Secretary'—is virtually identical to that under consideration in [*Schweiker* v.] *Gray Panthers*, [453 U.S. 34] and *Batterton*." Br. in Opp. 11. But plucking those four words out of context is as informative as quoting a statutory prohibition without stating the nature of the offense or the penalty. It is the language following thereafter and delineating the *scope* of the delegation that is the heart of the matter. And it is in this respect that the delegations in the Social Security Act involved in those cases differs *toto coelo* from that in the Davis-Bacon Act. In the Social Security Act Congress spoke in the most general possible terms in granting the HEW Secretary authority to "prescribe[] . . . standards" without further specification. In contrast in the Davis-Bacon Act Congress stated that the "wages that will be determined by the Secretary of Labor" are "to be *prevailing* for the *corresponding classes of laborers and mechanics* employed on *projects of a character similar to the contract work* in the *city, town, village, or other civil subdivision of the State in which the work is performed* . . . ." 40 U.S.C. § 276a. There is nothing in this language which authorizes the Secretary of Labor to set his own standard as to what constitutes a "prevailing . . . wage," a "class of laborers and mechanics", or a "project of character similar to the contract work." Yet that is exactly what the Court of Appeals said the Secretary of Labor may do here.

out best if the settled rule is adhered to." *Atchison, T. & S.F.R. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-808, quoted in *Motor Vehicle Mfrs.*, 51 L.W. at 4956 (emphasis added).

Thus, both the rationale and the result in *Motor Vehicle Mfrs.* refute the Court of Appeals' and Secretary's thesis that in assesing an initial regulation and a change in a long-standing regulation "the ultimate legal issue remains the same: Is the agency action within the scope of statutory discretion?" Br. in Opp. 12. The *Motor Vehicle Mfrs.* Court decided that the Transportation Secretary in changing a prior regulation failed to adequately justify an exercise of a discretion narrowed by the presumption in favor of retaining the prior regulation. As was stated by District Court in this case, following *Norwegian Nitrogen Co. v. U.S.*, 288 U.S. 294, 315, and anticipating *Motor Vehicle Mfrs.*:

> [W]hen an agency abruptly changes a longstanding administrative position, regardless of the context, it may be expected at a minimum to show that the earlier understanding of the statute was wrong or that experience has proved it to be defective. As indicated *supra*, the Secretary has done neither; his primary reliance throught has been on cost and cost savings—matters neither of novel experience nor of special expertise, but well known and considered by the Congress as early as 1931. [Pet. App. 63a-64a, footnote omitted; see also *id.* at 60a-63a quoted in part at Pet. 9-10]

Neither the Secretary's explanation and justification of the challenged regulations, the Court of Appeals' decision nor the brief in opposition makes such a showing for all mistakenly deny that there is any need to do so.

(c) *Motor Vehicles Mfrs.* makes clear that, "[n]ormally an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider." 51 L.W. at 4956, quoted at Pet. 12. *A fortiori* it is arbitrary and capricious for an

administrator to make such a change on a ground *opposed to* the congressional policy of the statute. Consider, for example, what short shrift the airbag regulation at issue in *Motor Vehicle Mfrs.* would have received from this Court if the Secretary of Transportation had sought to justify that regulation on the ground, among others, that airbags would be *too* safe, thereby diminishing the thrill of driving, or what the result would have been if the regulation in *Schweiker v. Gray Panthers*, 453 U.S. 34 (Br. in Opp. 11-12) had rested on the Social Darwinist theory that the medically needy should not be given aid because to do so undermines their self-reliance. Yet the Secretary of Labor has done the equivalent here by focusing in the preamble to the challenged regulations, and in the regulatory impact analysis (summarized in the preamble), on the cost aspects of those regulations and on the proposition that by lowering wage rates the regulations save money to the Federal Government.

The brief in opposition does not controvert our showing (Pet. 14) that this rationale is inconsistent with the purpose of the Act; that brief maintains a discreet silence on the subject. *Amicus curiae* PSRC, however, embraces as sound the proposition that "consideration by the Secretary of public policy concerns such as cost savings to the taxpayers under the proposed regulations," is in accord with law. PSRC Br. 14, heading. The arguments of the employer associations and others emphasizing the desirability of a greater emphasis on cost saving and a lesser emphasis on labor protections quoted *id.* at pp. 15-18 were properly presented to *Congress*, which has the power to modify the Davis-Bacon Act by adopting the substance of any or all of the Secretary's regulations, or of repealing the Davis-Bacon Act altogether.[3] Congress

[3] That Congress declined the proffered opportunity to eliminate the historic 30% rule for determining the prevailing wage (see testimony of Mr. Fettig quoted at PSRC Br. 15), is an additional ground for invalidating the present Secretary's elimination of that rule by administrative fiat.

to this point has refused to do so. On the contrary, as the Secretary concedes:

> Since 1935, Congress has extended the Act's prevailing wage requirements by statute to many other federal and federally-assisted construction programs, generally by requiring payment of wages determined in accordance with the Davis-Bacon Act. [Br. in Opp. 2; see also Pet. 7-8]

And on many of those occasions Congress has considered and rejected the argument that the Act imposes unacceptable costs on the Government.

The Secretary was duty bound to follow the policy of the law as Congress declared that policy, and since the Secretary violated that obligation it was the Court of Appeals' responsibility, which was not discharged, to set the challenged regulations aside as "arbitrary, capricious [and] not in accordance with law."

(d) The Court of Appeals' difficulty in grasping the correct approach to judicial review of changes in long-standing administrative rules is not a passing phenomenon. Its more recent decision in *ILGWU et al. v. Donovan et al.*, —— F.2d —— (C.A.D.C. No. 82-2133; Nov. 29, 1983) shows that on this critical question that cuts across the entire field (Pet. 6-7) the instant decision sows continuing confusion. Given the District of Columbia Circuit's heavy administrative law docket and the fact that every regulation adopted by a federal administrator is subject to review in that circuit, intervention by this Court is urgently required.

In the instant case the Court of Appeals relied on the proposition that in reviewing regulations on how a statute is to be enforced "our deference to [the administrator's] choice is properly near its greatest." Pet. App. 37a.[4] The *ILGWU* case concerned such an enforcement

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[4] This statement was made in the context of approving the challenged "helpers" regulation. We show hereafter (*infra* pp. 10-11) that this is an incorrect characterization of the legal question presented by that regulation.

regulation and one as to which, in contrast to the instant case, Congress provided no explicit statutory guidance whatsoever. "That action ar[ose] out of the decision of the Secretary of Labor (hereinafter the Secretary) to rescind longstanding restrictions on the mployment of workers in their home (homeworkers) in the knitted concern "that when homeworkers are employed it is not possible effectively to enforce the minimum wage, overtime compensation and child labor provisions of the Fair Labor Standards Act of 1938." *ILGWU* Sl. Op. 2. Yet the Court of Appeals decision overturning the Secretary's new homeworker regulations contains a six page section entitled "Scope of Review" that does not so much as use the word "deference." See *id.* at 30-36. Rather, in *ILGWU* the Court of Appeals recognized and gave weight to the consideration that:

> [T]his case involves review of an agency's rescission of a longstanding policy. . . . This settled course of behavior truly embodied the Division's informed judgment that restricting homework would best carry out the policy dictated by Congress. . . The Division's adherence to the restrictions between 1942 and 1980 is a reflection of the widespread and persisting decision that restriction of homework was a prerequisite to effective enforcement of the Act. [*ILGWU* Sl. Op. 31-33.]

And based on that recognition, in *ILGWU* that court concluded:

> Our review of the Secretary's decision is not merely perfunctory. We are to engage in a searching and careful inquiry, the keystone of which is to ensure that the Secretary engaged in reasoned decisionmaking. [*Id.* at 36.]

If the foregoing strikes a familiar note it is not surprising, for these words are all but identical to the words of the District Court in the instant case. See Pet. App. 61a-62a. In this case, of course, that court was rebuked by the Court of Appeals for placing "heavy reliance on

[prior long-standing] administrative practice. . . ." Pet. App. 15a. In order to paper over this discontinuity the Court of Appeals now suggests a novel distinction: "Unlike *Building & Construction Trades' Dep't*, the instant case does not involve a claim that the applicable statute precludes rescission of longstanding policy; instead, the issue is whether the rescission was 'arbitrary and capricious.'" *ILGWU* Sl. Op. 34 n.32. This distinction, we submit, exacerbates the problem the Court of Appeals itself created by its erroneous approach in this case.

According to the Court of Appeals there are two discrete classes of cases—cases in which the "only" claim is that a change in long-standing regulations is contrary to quite specific statutory language, its legislative history, the overall statutory purpose and the contemporaneous interpretation of the legislative materials, and cases in which the claim is that there is not a fully articulated basis for the change—and in the former class of cases the courts are to accord the administrator more deference than in the latter. This Court has never drawn such a line of demarcation. The point of Congress' statutory directives is to set the limits of administrative discretion and the point of judicial review is to establish what those directives mean and to assure that Congress' intent once established is respected. The general requirement stated in the phrase "reasoned decisionmaking" and the more particular requirement embodied in the "presumption . . . against changes in the current policy that are not justified by the rulemaking record" (*Motor Vehicle Mfrs.*, 51 L.W. at 4956) are means to that *single* end. To be sure there are differences in degree but those differences cut in just the opposite direction from the one the Court of Appeals is taking; the more specific the legislative directives, the *heavier* the weight to be accorded contemporaneous interpretations and the *stronger* the presumption against change that the administrator must overcome.

II.

The Secretary contends that "petitioners make no showing whatever [that] three of the challenged regulations" are "arbitrary, capricious or otherwise not in accordance with law." Br. in Opp. 13. This contention disregards the showing in point I of the petition, elaborated above, that under a proper standard of review the Secretary's actions in overturning longstanding regulations adopted contemporaneously with the statute, without providing a justification that overcomes the presumption against such changes recognized in *Motor Vehicle Mfrs.*, is not "in accordance with law." While the challenged "helpers" regulation is fatally defective for the same reason, there are two additional reasons why that regulation should have been set aside by the Court of Appeals.

(a) The Secretary concedes the basic premise of our challenge to the "helpers" regulation by stating that petitioners "correctly point out (Pet. 15) that the statutory language, as well as the legislative history, indicates that each class of laborers and mechanics for which a wage schedule is to be established would be differentiable. Otherwise, employers could evade wage requirements by misclassifying workers." Br. in Opp. 14. Nevertheless the Secretary argues that "the basis for distinguishing between classes of laborers and mechanics need not be 'task-oriented'; nothing in the statute prohibits the Secretary from drawing a distinction—as he has here—on the basis of degree of supervision." *Id.*

The assertion that "there is nothing in the statute" prohibiting the Secretary's "degree of supervision" distinction is accurate only in the trivial sense that Congress did not in the express statutory language require a task-oriented definition. For that assertion begs the critical question whether Congress in using the phrase "classes of laborers and mechanics" intended to delegate to the Secretary the power to define classes on whatever basis the Secretary chose. We submit that Congress had no such intent.

The 1935 Act was the product of Congress' concern over the misclassification of workers by such devices as the use of "intermediate classifications" and the "hiring [of] mechanics as common laborers, and then assigning them to *tasks* which fell within the purview of one of the skilled crafts." Pet. 19 quoting the 1935 Senate Report (emphasis added). It would appear then that Congress had a "task-oriented" definition in mind. And if that is not dispositive, to the extent the statute is construed to grant the Secretary *some* discretion in defining classes it does not follow that he is empowered to "draw[] a distinction * * * on the basis of degree of supervision." Br. in Opp. 14. That criterion, or any other, is permissible only if the admitted congressional objective of preventing employers from "evad[ing] wage requirements by misclassifying workers" (*id.*) is advanced by its adoption. It is difficult to conceive of a criterion more evanescent and more conducive to evasion than one based on the "*degree* of supervision," particularly the degree of supervision provided by journeymen who by definition are *not* supervisors at all and who under the challenged regulation would be doing *exactly the same work* as the helpers those journeymen are supposedly supervising. Certainly the Secretary does not give a hint as to how enforcement of the challenged regulation could possibly be accomplished or even of a recognition that it is his particular responsibility under the statute to adopt criterion that facilitate enforcement. This in itself invalidates the regulation.

Moreover, the determination of the scope of the delegation to the Secretary to define "classes of laborers and mechanics" is one which should have been made by the ocurt below *without any deference to the Secretary's expansive view of his own authority.* As this Court has explained, "An agency may not finally decide the limits of its statutory power. That is a judicial function." *Social Security Board v. Nierotko*, 327 U.S. 358; 369, quoted with approval in *Batterton*, 432 U.S. at 425, n.8. Yet the

Court of Appeals, in a passage underlined by the Secretary, sharply circumscribed its review on the theory that "judicial deference to agency decisions 'is properly near its greatest' on questions of the relative enforceability of different approaches to administering a statute." Br. in Opp. 17 quoting Pet. App. 37a. While unexceptionable where Congress has only established statutory norms, and left questions of enforcement entirely to an administrator, that principle is plainly inapplicable where Congress itself has addressed the question of enforceability and has crafted the statute to prevent evasion. To accord deference to the administrator's determination on enforceability in that situation, which is admittedly the situation in this case, is to allow the administrator to impermissibly substitute his own judgment for that of Congress.

(b) The brief in opposition further impeaches the Secretary's "helpers" regulation by stressing that the regulation was adopted for reasons extrinsic to the enforcement purpose of the "classes" concept, and indeed to any of the purposes of the Davis-Bacon Act. The Secretary asserts that we disregard certain of his reasons for the regulatory change

> including increasing job opportunities for less skilled workers, especially young people, women, and members of minority groups now frozen out by restrictive federal requirements limiting the demand for semi-skilled labor, encouraging job training, increasing productivity, and enabling a broader class of contractors to compete for government work. See 47 Fed. Reg. 23651 (1982). [Br. in Opp. 14-15; see also PSRC Br. in Opp. 18-20.]

We did not "disregard" the Secretary's reliance on these factors because we considered such reliance to be harmful to our position; rather, mindful of the admonition of this Court's Rule 21.5,[5] we resisted the tempta-

[5] "The failure of a petitioner to present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying his petition."

tion to present a Leporellonian catalogue of the Secretary's sins of commission. For, as we have observed above, *Motor Vehicle Mfrs.* teaches that "[n]ormally an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider." 51 L.W. at 4956. Under this principle of judicial review the "helpers" regulation is clearly "arbitrary and capricious" because none of the above-listed "other reasons stated by the Secretary for the regulatory change" (Br. in Opp. 14-15) are even arguably germane to the Secretary's assigned task of determining what "wage" is "prevailing."[6]

The Secretary's reliance on these factors is not only legally impermissible, it is factually inaccurate. When this point was argued to the District Court, Judge Greene, who came to the local and federal bench after distinguished service in the Civil Rights Division of the Justice Department, wrote:

> As for the argument of the *amicus* that increased use of the helper classification promotes employee opportunity, it appears that as of 1978 minority participation in joint union-management apprenticeship programs was 21.2 percent while its participation in

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[6] There is closely analogous precedent in this Court which confirms the impropriety of the Secretary's reliance on the most attractive of these "other reasons", namely providing job opportunities to "young people, women, and members of minority groups." In *NAACP* v. *FPC*, 425 U.S. 662, the Court held that although "the elimination of discrimination from our society [clearly] is an important national goal" (*id.* at 665), the FPC "is authorized to consider the consequences of discriminatory employment practices on the part of its regulatees *only* insofar as such consequences are directly related to the Commission's establishment of just and reasonable rates in the public interest," (*id.* at 671, emphasis added). In *NAACP* v. *FPC* there was such a relationship between rates and "illegal, duplicative or unnecessary labor costs" which "are demonstrably the product of discriminatory practices." *Id.* at 668. In this case the Secretary does not even claim that *any* relationship exists between his "other reasons" for the challenged "helpers" regulation and achieving the purposes of the Davis-Bacon Act.

> open-shop trading programs was only 11.4 percent. Department of labor data tabulated for Union and Open Shop Construction, p. 71 (1978). The regulation adopted by the present Secretary is likely to have the effect of allowing contractors to replace higher wage minority laborers with lower wage minority helpers. [Pet. App. 73a, n.4]

This finding was not disturbed by the Court of Appeals which in sustaining the regulation did not advert to the Secretary's "reliance" on these factors.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition for a writ of certiorari, the petition should be granted.

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BRIEF *AMICUS CURIAE* OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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BRIEF *AMICUS CURIAE* OF THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

The Associated General Contractors of America, Inc. (AGC) hereby respectfully submits this brief in opposition to the Petition for a Writ of Certiorari filed by the Building and Construction Trades Department, AFL-CIO, *et al.* (hereinafter "the Petitioners"), seeking review of the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on July 5, 1983. A Petition for Rehearing and Rehearing En Banc was denied on September 16, 1983. Amicus accepts Respondent's Statement of the Case, Statutory

Provisions Involved, and Parties to the Proceedings Below.*

INTEREST OF THE AMICUS

The Associated General Contractors of America, Inc. is a national trade association consisting of 112 state and local chapters. Its 32,000 member firms, including approximately 8,500 of America's leading general contracting firms, operate in the construction industry in the United States and Puerto Rico, and are responsible for the employment of 3.5 million workers.

Construction is the largest industry in the United States, representing approximately 8 percent of the nation's Gross National Product. AGC members perform almost 80 percent of the general contracting construction work performed in the United States each year, including the construction of commercial buildings, highways, industrial and municipal-utility facilities and other construction covered by the Davis-Bacon Act.

AGC regularly represents the interests of its general contractor members in important matters vitally affecting those interests before the courts, the United States Congress, the Executive Branch and independent regulatory agencies of the Federal Government. This includes assistance to courts in their deliberations on significant decisions concerning labor-management relations and labor standards in the construction industry, such as the issues Petitioners seek to bring to this Court.

AGC members include a large number of firms which bid on, negotiate for, and undertake public construction of all types which is subject to the Davis-Bacon Act. Over the years, a major membership service of AGC has been assistance on Davis-Bacon matters, often including issues similar to those contained in the regulations which are the subject of the Petition. Thus, AGC has a strong

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* Pursuant to Sup. Ct. R. 36.1, written consent of the parties to the filing of this brief is submitted herewith.

interest in the lawful and reasonable implementation of the Davis-Bacon Act, particularly since its membership includes contractors who use union labor exclusively, non-union labor exclusively and contractors who use a mix of workers. Each type of contractor is affected differently by the Act. AGC's 52 years of experience with the Act and 65 years in the construction industry place it in a unique position to serve as an *amicus curiae* in this proceeding.

REASONS FOR DENYING THE WRIT

Petitioners have failed to demonstrate that the decision of the U.S. Court of Appeals below conflicts with the decision of another such court; or that it departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision; or that the court below decided an important question of federal law which has not been, but should be, decided by this Court, or, contrary to Petitioners' contentions, has decided a federal question in a way in conflict with applicable decisions of this Court. Sup. Ct. R. 17(a) & (c), (1980). By these measures alone the Writ should be denied.

The court below correctly selected the proper standard of review for legislative rules and duly applied that well defined standard to the regulations at issue in this case.

1. The Court of Appeals Used the Proper Standard of Review

Section 1(a) of the Davis-Bacon Act, 40 U.S.C. Sec. 276a (hereinafter "the Act"), provides that: "minimum wages to be paid various classes of laborers and mechanics . . . shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed. . . ."

This langauge looks to the Secretary to determine not only the wages which prevail but also the classes of workers for which prevailing wages will be computed. The method and factors to be used in this process, as well as the specific rates, are purely for the Secretary to decide, and a clearer example of delegated power to make legislative rules would be difficult to imagine. The only limitation is the implicit one that the Secretary shall define and implement the concept to serve the statute's fundamental purpose—to ensure that the wages paid on covered construction projects mirror the wages generally paid on similar private construction projects in the area. The key factor is the delegation of ultimate power to determine the content of the law. Professor Davis has stated the standard concisely:

> The "talismanic factor" is whether or not the agency intended to exercise delegated legislative power to make law through rules; if it did, the rule is legislative, and if it did not, the rule is interpretive. That is the only test. Davis, *Administrative Law Treatise*, 2d ed., Sec. 7:15, at 71 (1982).

If the Secretary's authority under the Act had been merely interpretive, as the Trades seem to suggest, the wage rates would have been fixed by the statute subject merely to interpretation and application to particular situations, much like the Secretary's interpretive powers under the Fair Labor Standards Act of 1938. 29 U.S.C. Secs. 201-219 (1976). Such is not the case with Davis-Bacon, and once it becomes clear that the challenged rules are legislative, the standard for review narrows considerably from that used for interpretive rules.

This Court has distinguished interpretive and legislative rules. The force and effect of an interpretive regulation depends, generally speaking, on its power to persuade. *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1940). A legislative rule, or one with legislative effect, controls

the legal issue unless the rule is beyond the scope of the authority which Congress delegated to the agency, or contrary to Section 706(2)(A) or (C) of the Administrative Procedure Act, 5 U.S.C. Sec. 706(2)(A) (1976). *Batterton v. Francis*, 432 U.S. 416 (1977).[1] Neither such condition exists in the present case.

Correctly perceiving little need for a prolonged discussion of the distinction between interpretive and legislative rules, the Court of Appeals below recognized that *Batterton v. Francis* not only sets for the proper standard of review for the challenged rules, but also fits that standard to the relevant context—where Congress has delegated broad authority to define and implement a key but ambiguous concept, and the agency has then exercised that authority.

In *Batterton*, this Court upheld a regulation which the Secretary of Health, Education, and Welfare had issued pursuant to Section 407(a) of the Social Security Act, 42 U.S.C. § 607(a), which authorizes the Secretary to define "unemployment" for the purposes of the Aid to Families with Dependent Children Program. That section provides:

> (a) the term "dependent child" shall, notwithstanding section 606(a) of this tile, include a needy child who meets the requirements of section 606(a)(2) of this title who has been deprived of paternal support or care by reason of the *unemployment (as determined in accordance with standards prescribed by the Secretary)* of his father, and who is living with

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[1] As they must, Petitioners argue that *Batterton* is not in point. The argument is singularly unpersuasive. The Davis-Bacon Act refers to "wages that will be determined by the Secretary of Labor to be prevailing." 40 U.S.C. § 276a (1976). The Social Security Act issue addressed in *Batterton* refers to . . . "unemployment (as determined in accordance with standards prescribed by the Secretary). . . ." 42 U.S.C. § 607(a) (1976). What is striking is not the difference in the statutory language but the similarity.

> any of the relatives specified in section 606(a)(1) of this title in a place of residence maintained by one or more of such relatives as his (or her own) home. 42 U.S.C. § 607(a) [Emphasis added.]

The *Batterton* Court recognized, as did the Court of Appeals below, that where Congress had expressly delegated a measure of its authority and the Secretary had exercised that authority, the resulting legislative regulation could be set aside only under very limited circumstances. Such circumstances, which were not present in either *Batterton* or the present case, would include the Secretary exceeding his statutory authority or the regulation contravening Section 706(2)(A) or (C) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A), (C), because arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

The two recent cases which so concern the Petitioner, *Motor Vehicle Mfgrs. Assn. v. State Farm Mutual*, —— U.S. ——, U.S.L.W. 4935 (June 24, 1983), and *BankAmerica Corp. v. United States*, —— U.S. ——, 51 U.S.L.W. 4685 (June 9, 1983), are entirely consistent with the earlier cases already cited, and do not conflict with the decision of the court below. *Motor Vehicle Mfgrs.* has no more than a remote and tangential bearing on the issues which this case presented to the Court of Appeals. *BankAmerica* is wholly inapposite.

Motor Vehicle Mfgrs., cited by Petitioners, is not contrary to the ruling below, and holds only that Section 706(2)(A) and (C) may also apply to an agency's exercise of its delegated authority to *revoke* a legislative rule. The obvious factual differences between that case and the instant one minimize its relevance here. These include the fact that the Davis-Bacon rules were revised, not revoked; that a complete administrative record was developed; that the Secretary carefully analyzed, considered and shaped the revisions in view of years of practical experience with the Act and numerous studies

of the Act; that the Secretary provided logical, rational and reasonable bases for each change (to be discussed *infra*); and that the changes here were neither arbitrary nor capricious.

Motor Vehicle Mfgrs. bears on this case only insofar as the Supreme Court paused to explain the applicable standard of review, but the Court was careful to point out that "the direction in which an agency chooses to move does not alter the standard of judicial review established by law." *Id.*, at 4956. The unsurprising essence is that the reviewing court must find "a 'rational connection between the facts found and the choice made.'" *Id., quoting Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962). Similarly, the Court of Appeals, in deciding this case, cited and relied on *Batterton*, acknowledging that the Davis-Bacon regulations had to be both reasonable and within the authority delegated to the Secretary.

BankAmerica Corp. v. U.S., supra, is the second case relied upon by Petitioners. That decision, however, is wholly inapposite, for it required this Court only to rule on the meaning of a statutory provision. This issue in that case was whether Section 8 of the Clayton Act, 15 U.S.C. Sec. 19, permitted banks and insurance companies to have interlocking directorates. The federal government, changing its historic but informal interpretation, argued that Section 8 prohibits such arrangements. Beginning with the language of the statute, and concluding with a review of its legislative history, this Court held that the petitioners were correct, and that the language of the statute prevailed over a change by the agency of an interpretation. In the language which the Petitioners quote (Petitioners' Brief at 12, 13), the Supreme Court merely applied the well-settled principles going to the weight to be given to an agency's exercise of its inherent authority to interpret the provisions of a statute which the agency has to enforce. The *Bank-*

America Court had no need to address the questions presented to the Court of Appeals below: whether an agency has properly exercised its expressly delegated authority to issue regulations with the force and effect of law.

Petitioners' reliance on *BankAmerica* reveals a great deal. From the outset, the essence of Petitioners' position has been that the Secretary of Labor's power to modify regulations long left on the books was limited by the mere passage of time. Petitioners have asserted the doctrine of contemporaneous and consistent construction, and argue that the modifications are therefore subject to intense scrutiny. Petitioners' insurmountable obstacle is that the principle of contemporaneous and consistent construction goes only to the weight which a court should give to an agency's interpretation of a statutory provision—to an interpretive rule's power to persuade. But when the Secretary issued these challenged regulations, he properly exercised his expressly delegated authority to issue regulations which have the force and effect of law.

Citing both *Motor Vehicles Mfgrs.* and *BankAmerica*, the Petitioners continue to blur the distinction between legislative and interpretive rules. One begins to suspect that in such confusion lies the Petitioners' only hope for success.

2. That Standard of Review Was Correctly Applied

The court below carefully applied the applicable *Batterton v. Francis* and APA standards of review to the legislative regulations at issue in this proceeding. That court properly found that the Secretary's choices, except as to those portions the court failed to uphold,[2] were

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[2] The court below ruled against the Secretary that helpers must prevail in an area and that weekly wage data must be submitted by contractors doing work covered by the Act.

within the broad discretion and authority conferred upon the Secretary by the Act, were rational and consistent with the statute, and were not arbitrary, capricious or otherwise not in accordance with law. 5 U.S.C. § 706 (2) (A) (1976). It properly reversed the District Court which erroneously viewed the regulations as interpretative and thus subject to a much different standard of review than the one appropriate to this proceeding. Thus, while the fact that rules are longstanding or contemporaneous with enactment of the statute may be important for the review of interpretive rules, these factors are irrelevant as to properly developed legislative rules such as those at issue here.

Properly recognizing that the language of the Act "in the broadest terms imaginable" [3] gives the Secretary power to determine the wages prevailing for various classes of workers, the court below found additional support for the Secretary's power to eliminate the 30 percent rule [4] in the legislative history and the lack of any indication that Congress intended to bind the Secretary to that rule forever. The Secretary's decision to alter a regulatory scheme which labeled as "prevailing" a rate not paid up to 70 percent of craft workers in an area certainly was logical and reasonable. It also was supported by studies done by the General Accounting Office and Oregon State University demonstrating that the rule caused wage distortion (i.e., did not reflect locally prevailing wages) and tended to pick up union wage rates

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[3] *Building and Construction Trades Dept., AFL-CIO et al.* v. *Raymond J. Donovan et al.*, 712 F. 2d 611 (D.C. Cir. 1973) reprinted in Petitioner's Appendix, hereinafter Pet. App., at 9a.

[4] Under the previous regulations, if a majority of workers in a craft in an area did not receive the same wage rate, the Department of Labor used a rate paid to at least 30 percent of those workers, or if 30 percent did not get the same rate, it used a weighted average. The revised regulations deleted the 30 percent rule but retained the other two methods. *See* 47 Fed. Reg. 23652 (Part 1.2a) (1982).

which typically are more uniform than open shop (non-union) rates.[5] Keeping the majority rate as the primary method for determining prevailing rates, as well as retaining the weighted average where 50 percent of workers did not receive the same wage, the Secretary relied on his expertise in dealing with the disruptive effects of the 30 percent rule by deleting it. Such a decision accords with the language and intent of the Act, as well as *Batterton v. Francis* and the Administrative Procedure Act.

Since the Secretary has been delegated by statute the authority to determine the prevailing wage, a corollary is that he has to decide what wage data will be collected, and from which areas, to compute that wage. Thus, he could restrict use of wage data from Davis-Bacon projects and could limit importation of wage data from urban to rural areas. The court below observed that the Act's legislative history demonstrates that the phrase "projects of a character similar" was intended to equate federal construction wages with those in private industry, since it was the federal competitive bidding requirement which had forced contractors to compete on the basis of wages prior to the enactment of the Act. (Pet. App. at 17a-18a). Thus, it would have made no sense to *require* the Secretary to survey federal projects, although the statutory language is broad enough to allow him to do so if the choice were made.

The revised regulations restrict use of Davis-Bacon project data only where private residential and building construction in the area is sufficient for developing the predetermined wage. 47 Fed. Reg. 23652, (Par 1.3(d)) (1982). Davis-Bacon highway and heavy projects will

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[5] General Accounting Office, *The Davis-Bacon Act Should Be Repealed*, 51-53 (April 27, 1979). Oregon State University, *Effect of the Davis-Bacon Act on Construction Costs in Non-Metropolitan Areas of the United States*, 2 (1982). *See* 47 Fed. Reg. 23644-5 (May 28, 1982).

continue to be part of the Davis-Bacon data base for those types of construction. Thus, the Secretary carefully structured his revisions to meet the statutory objective of reflecting rates in private industry while avoiding a wage spiral resulting from inclusion of high wage public projects. See 47 Fed. Reg. 23645 (May 28, 1982).

For a similar reason, the court below upheld the strengthened limitations on importation of wage data from urban to rural areas in Part Sec. 1.7(b) of the regulations. The Secretary reasonably believed that wage importation caused wage distortion, contrary to the objectives of the Act to reflect local rates, since urban rates tend to be higher than rural rates. (See 46 Fed. Reg. 41,445 (1981) (Proposed rulemaking) and 47 Fed. Reg. 23647 (1982). Moreover, he found that federal project wages based on imported urban wage rates disrupted rural labor relations in the private sector. *Id.* In fact, the Secretary was merely doing what the Act intended: revising the legislative regulations to implement changes he felt necessary to reach statutory goals based on the Department of Labor's experience with performance of the previous rules.

In affirming the Secretary's clarification on the use of helpers[6] on covered projects in 47 Fed. Reg. 23667 (5.5 (n)(4)(1982), the court below found that changing the basis of the helper classification from tasks done to one of supervision by a journeyman was both logical and within the Secretary's statutory discretion. Moreover, the court recognized that since the Secretary has the power to determine wage rates for various classifications, he also must have the ability to decide the classifications themselves. (Pet. App. at 35a)

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[6] Helpers are semiskilled construction workers who are neither journeymen nor apprentices or trainees. *See* 47 Fed. Reg. 23659 (Part 5.2(a)(4) (1982). Helpers are allowed on Davis-Bacon projects with certain limitations under present rules. *See* 47 Fed. Reg. 23,647 and 23,659 (1982).

The legislative history, the court found, focused on Congress' desire to carry local practices into federal work. Since a solely task-based definition would be contrary to prevailing local labor practice in many areas (See 47 Fed. Reg. 23,647, 23,662 (1982)), with the changes the Secretary reasonably sought to bring federal labor rules more closely into alignment with those common on private work.[7] The rules would not permit helpers in areas where they would be contrary to local practice, since the court below specifically ruled that the classification must be prevailing in order to be used.[8] To guard against misuse of helpers, the Secretary provided that helpers would receive journeyman rates if they performed journeyman work. 47 Fed. Reg. 23670 (Part 5.5(a)(4)(iv)(1982). In addition, helpers were limited to 40 percent of craft workers on site, a consideration the Court below found not to be as desirable as a ratio based on local practice, but which was relevant to the Secretary's view of enforcement of the new rules. (Pet. App. at 39a)

Measured by the correct standard of review, the revised regulations were found by the court below to be a reasonable and rational exercise of the Secretary's statutory discretion under the Act.

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[7] The Secretary's finding that the use of helpers in private construction was widespread is confirmed by extension of the helper concept even by unions. *See* Engineering News-Record, *Unions Battle Domination With Wage Concessions*, 59 (January 27, 1983).

[8] The Secretary sought to allow helpers where they were "identifiable." *See* 47 Fed. Reg. 23655 (Part 1.7(d)) (1982).

CONCLUSION

The record demonstrates that the court below correctly concluded that the revised regulations were within the legislative authority and discretion of the Secretary, and were not arbitrary or capricious or otherwise not in accordance with law. For this reason, Amicus AGC respectfully requests that the Petition be denied.

Respectfully submitted,

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No. 83-697

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BUILDING AND CONSTRUCTION TRADES DEPARTMENT, AFL-CIO, *et al.*,
Petitioners,

v.

RAYMOND J. DONOVAN, *et al.*,
Respondents.

BRIEF AMICUS CURIAE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT ON BEHALF OF PUBLIC SERVICE RESEARCH COUNCIL

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INTEREST OF THE AMICUS CURIAE

Public Service Research Council[1] is an independent national citizens' organization engaged in nonpartisan research and education concerning public service unionism and its effects upon the nation's governmental institutions and their services to all Americans. It is a voluntary association of private citizens, legislators, scholars, and commentators united by a common concern with the maintenance of limited, constitutional government.

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[1]Public Service Research Council requested and received consent from Petitioners and the Solicitor General to the filing of this brief *amicus curiae*. Counsels' letters have been filed with the Clerk of the Court.

Because of the Council's above stated fundamental concerns, it has been active as a friend of the court at all levels of the legal process to affect evolving concepts of law in connection with various matters in the public interest and has filed briefs *amicus curiae* in numerous cases before this and other courts.[2]

STATEMENT OF CASE

The Davis-Bacon Act, 40 U.S.C. §276a, was originally enacted in 1931, during the Great Depression, in order to equalize the wages paid to laborers and mechanics working on federal construction with the wages prevailing in the locality where the construction was being undertaken. Although this Act only applies to federal construction work, its terms have been incorporated by reference into more than fifty-eight other federal statutes which provide some form of federal financial assistance. 48 Fed. Reg. 19,532 (April 29, 1983). The Copeland Anti-Kickback Act, 40 U.S.C. §276c, was enacted in 1934, and required *inter alia,* the weekly submission of certain information to the federal government to insure that prevailing rates were paid.

On August 14, 1981, the Secretary of Labor published certain proposed revisions in the regulations which implement these Acts. 46 Fed. Reg. 41,444. Nine months later the Secretary of Labor made certain revisions and issued these as final regulations to become effective on July 27, 1982. 47 Fed. Reg. 23,644-79 (May 28, 1982).

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[2]Public Service Research Council filed a brief with the United States District Court as *amicus curiae* on July 16, 1982 in support of the government, arguing that the Secretary of Labor had discretion to promulgate the regulations in question.

Petitioners Building and Construction Trades Department, AFL-CIO, sixteen AFL-CIO unions or departments and the Teamsters Union ("Unions") sought to enjoin portions of the proposed regulations in five separate areas. The Unions' Motion for Preliminary Injunction was granted by the U.S. District Court for the District of Columbia on December 23, 1982. On July 22, 1982, the District Court granted in part summary judgment to the Unions.

The Government took an appeal to the U.S. Court of Appeals for the D.C. Circuit which affirmed the District Court in part and reversed in part on July 5, 1983. Petitioners filed a Suggestion for Rehearing En Banc in the U.S. Court of Appeals, which was denied on September 16, 1983. Subsequently Petitioners filed a Petition for Writ of Certiorari in this Court on October 26, 1983.[3]

THE PETITION SHOULD BE DENIED

I. THE STANDARD OF REVIEW USED BY THE COURT OF APPEALS WAS CORRECT AND IN CONFORMITY WITH DECISIONS OF THIS COURT.

Petitioners incorrectly claim that the approach of the Court of Appeals in its decision below is inconsistent with the approach mandated by this Court in *Motor Vehicle Mfrs. Ass'n. v. State Farm Mutual,* ____ U.S. ____, 103 S. Ct. 2856 (1983) and in *BankAmerica Corp. v. United States,* ____ U.S. ____, 103 S.Ct. 2266 (1983); and that the Court of Appeals held the erroneous view that

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[3] *Amicus curiae* Public Service Research Council opposes granting this petition for certiorari, but if the petition is to be granted, then review of all regulations should be undertaken by this Court so as not to deny review of those regulations overruled by the Court of Appeals.

> the judiciary is to show extreme deference to administrators who seek to substantially alter settled rules as to what a statute means without explaining why those rules are mistaken and are not to give substantial weight to the prior administrator's understanding of the statute. . . . [Pet. 7.]

In fact, the well reasoned Court of Appeals decision used an "arbitrary and capricious" standard of review as reiterated by this Court in *Motor Vehicle Mfrs.;* and the decision in *BankAmerica Corp.* is inapposite to the questions presented by the petitioners herein. Petitioners have not even made a colorable showing that certiorari should issue as the opinion of the Court of Appeals is well reasoned, consistent with applicable law, and does not require an exercise of this Court's power of supervision. Supreme Court Rule 17.1(a).

A. Petitioners Erroneously Claim that the Prior Regulations Have Proven Effective in Operation.

In framing the first question presented for review, and in alleging that the Secretary's stated reasons were insufficient to support a change in these regulations, Petitioners simply assume that these regulations have been effective in operation. Pet. 1, 6. This assumption is at odds with governmental findings. The United States General Accounting Office, an arm of the U.S. Congress, has researched the operation of these regulations, issuing eight reports from June 1962 through April 1979. In its most recent report, GAO summarized its findings in bold terms.

> After nearly 50 years of administering the Davis-Bacon Act, the Department of Labor has not

> developed an effective system to plan, control, or manage the data collection, compilation, and wage determination functions. [*The Davis-Bacon Act Should be Repealed,* General Accounting Office (April 27, 1979) ii.]

After reviewing these reports, one can only conclude, rather, that the Secretary of Labor was compelled to revise the antiquated regulations in order to improve their operation and more closely approximate the intent of the Congress in its adoption of the Davis-Bacon Act. 46 Fed. Reg. 41,445-46 (1981).

B. The Elimination of the Thirty Percent Rule.

In affirming the District Court's upholding of the Secretary's elimination of the "thirty percent rule" the Court first determined that the

> statute delegates to the Secretary, in the broadest terms imaginable, the authority to determine which wages are prevailing. . . . The legislative history confirms that it was envisioned that the Secretary could establish the method to be used. *See, e.g.,* 74 CONG. REC. 6516 (1931) (remarks of Rep. Kopp) ("A method for determining the prevailing wage rate might have been incorporated in the bill, but the Secretary of Labor can establish the method and make it known to the bidders.") [Pet. App. 9a-10a.]

Having determined that the Secretary's discretion in ascertaining "prevailing wages" was broad, the Court correctly limited its review, "to ensuring that the new definition is not one 'that bears no relationship to any recognized concept of [the statutory term] or that would defeat the purpose of the [statutory] program' . . ." Pet. App. 10a.

As described, this standard of a review is precisely equivalent to that recited by this Court in *Motor Vehicle Mfrs.* In *Motor Vehicle Mfrs.*, this Court dealt with a rescission of a proposed U.S. Department of Transportation regulation which required the installation of passive restraint systems in automobiles. The standard of review was described.

> The agency's action in promulgating such standards therefore may be set aside if found to be "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." (citations omitted). We believe that the rescission or modification of an occupant protection standard is subject to the same test.
>
> . . . Accordingly, an agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.
>
> In so holding, we fully recognize that "regulatory agencies do not establish rules of conduct to last forever," . . . and that an agency must be given ample latitude to "adapt their rules and policies to the demands of changing circumstances." [*Motor Vehicles Mfrs.*, 103 S. Ct. at 2865-66.]

Petitioners read *Motor Vehicle Mfrs.* as requiring, in the event an agency attempts to rescind or modify a long-standing rule, that the reviewing Court give "dispositive weight to the prior regulatory record." Pet. 11. *Motor Vehicle Mfrs.* does not require such a burden on the agency; only that the agency examine the relevant data and articulate a satisfactory explanation, which rebuts any presumption that the prior rule was the only rule appropriate under the statute.

In the instant case, Secretary Donovan set out a reasoned analysis in support of his regulations. Thus, *Motor Vehicle Mfrs.* applies to a very different situation and provides no support for the proposition that the standard used in the case below by the Court of Appeals in reviewing the Secretary of Labor's elimination of the thirty percent rule to determine prevailing wages was incorrect.

C. The Exclusion of Urban Counties from Rural Wage Determinations.

Explicitly and demonstrably the Court of Appeals used the "arbitrary and capricious" standard in reviewing the Secretary's proposed regulation that, where there has not been sufficient similar construction in the county in which a project is located to determine a prevailing wage, he will look at wages paid on similar construction in surrounding counties; except that he will not use projects in metropolitan counties as a source of data for projects in rural counties, and *vice versa.*

First, the Court noted that "[n]either party questions the Secretary's basic claim of authority to look beyond the county line if necessary to determine the prevailing wage in the county in which the project is located." Pet. App. 11a. In analyzing the language of this statute and its legislative history, the Court found the appropriate extent of delegation of authority to the Secretary: "In essence, Congress anticipated that the general authorization to the Secretary to set the prevailing wage would encompass the power to find a way to do so in the interstitial areas not specifically provided for in the statute." Pet. App. 13a.

The standard expressed by the Court is "arbitrary and capricious" and its analysis comports with that standard:

> We review the Secretary's choice of methods only to ensure that he is acting consistently with the purposes of the statute and that his choice is not arbitary. We think it clear that the new regulation is rational and furthers the purposes of the statute. The Secretary's justification for the provision was that, because of the disparity between urban and rural wages, using demographically dissimilar counties for such determinations is unreliable. . . . Furthermore, the Secretary claimed, importation of high urban wages to rural areas has disrupted labor relations in rural areas because employees have been unwilling to return to their usual pay scales after a Davis-Bacon project has been completed. [Pet. App. 14a.]

The Court addresses the fundamental misperception of the Petitioners who seek to give dispositive weight to the fact that a different rule was used for a considerable period, and in support, look to *BankAmerica Corp.* Basically, such weight is given only when an agency has historically *interpreted* a statute in a certain way and then reverses itself to a contrary position; not when an agency within its delegated authority changes its method in order to reasonably achieve a statutory goal. Pet. App. 15a-16a.

It is clear that *BankAmerica Corp.* dealt with the adoption of an interpretation of a statute *directly contrary* to that held for a sixty-year period, in the context of federal criminal prohibitions, and not with a discretionary change designed to more closely achieve the purpose of a statute than regulations out of step with the times.

The central issue in *BankAmerica Corp.* was "a narrow statutory question" and the government's new interpretation was found to be contrary to the plain meaning of the statute. 103 S. Ct. at 2270-71. The Court did not defer to

the historic interpretation; rather it looked first to the statute and determined its meaning; it cited the interpretation history only in support of the conclusion it reached from statutory analysis. The present case does not involve "a crabbed interpretation of the words of a statute which so many in authority have interpreted in accordance with its plain meaning for so long." 103 S. Ct. at 2273.

D. The Exclusion of Federal Projects From Wage Determinations.

Again, in its review of the Secretary's proposed exclusion of certain categories of federally-assisted projects from consideration in determining prevailing wages, the Court of Appeals adhered to the correct "arbitrary and capricious" standard and correctly concluded that the Secretary has the authority to exclude such data.

The Court's premises were that the Act's central goal is to ensure *equality* of wages paid to federal project workers and private project workers but does not require or suggest that these wages be *greater* than those of their private project counterparts. The Secretary determined that the current system of including federal project data in the "prevailing wage" determination of private sector wages skewed that wage upward, against the intent of Congress. "Neither the District Court opinion nor the unions dispute the factual basis for this conclusion. Rather, the unions argue that the act and its legislative history, including congressional acquiescence to administrative practice, forbid exclusion of federal projects." Pet. App. 17a.

The Court extensively analyzes the legislative history and economic conditions giving rise to the need for Davis-Bacon, finding that because federal projects had to be

awarded to the lowest suitable bidder, contractors were paying wages *less* than those for private projects:

> With this as the Act's premise, it would make no sense to *require* the Secretary, when setting prevailing wages, to include federal projects in his survey. Since the problem to be remedied was the low wages paid on federal projects, to include them would only impede attainment of the ultimate goal of counterbalancing the flaws in the federal bidding system and equalizing federal and private wages. [Pet. App. 19a.]

The Court's analysis of the purposes of the statute demonstrates not only that the proposal to exclude federal projects is within the Secretary's discretion but also that it furthers the statute's primary goal of *equality* of pay better than the prior regulation.

> To continue to include them now that federal wages are far above those paid in the private sector, however, would only exacerbate in the opposite direction the kind of problem – an inequality between federal and private wages – Congress was seeking to avoid. The fact that no Secretary has previously abandoned the practice does not take away from the current Secretary's power to fine tune his exercise of discretion. [Pet. App. 21a.]

E. The Expanded Definition of Helpers

The Court of Appeals upheld two elements of the Secretary's proposal regarding the use of the "helper" class of workers: the conformity of the definition of "helper" with currently existing practice; and the limit of two helpers for every three journeymen employed on a project. Pet. App. 29a-39a.

Petitioners strongly oppose this decision, insisting that it is contrary to the central purpose of the Act and contrary to the prior "interpretation" of the phrase "classes of laborers and mechanics" inserted into the Davis-Bacon Act by the 1935 amendments. They contend that the issue is one of statutory interpretation and that the Court of Appeals mischaracterized the Secretary's decision as an enforcement decision to which it applied the wrong standard of review. Pet. 17.

In fact, the Court of Appeals applied the same standard of review here ("All things considered, the unions have not shown the Secretary's choice of regulatory schemes to be arbitrary or capricious," Pet. App. 39a), and applied it scrupulously, first looking to the intent of the Act through its language and legislative history and then to the articulation by the Secretary of the reasons for the change; it found that the Secretary had met his burden of relating the change in a reasonable way to the goals of the Act and that the central question was not one of statutory interpretation but rather one of the extent of the discretion afforded the Secretary to select methods of achieving equality with private project wages.

The new regulation would define the "helper" essentially as one who works *under the supervision of a journeyman.* Petitioners' view is in effect that a "helper", because by definition he sometimes uses a journeyman's tools and thus overlaps a journeyman's duties, although under supervision, is an outlawed category of worker under the 1935 amendment which requires equality of wages between "classes of laborers and mechanics." Petitioners claim that each such class must be discrete and distinguishable, *based on the type of task the worker is entitled to perform.* Pet. 15-17.

The first question which the Court of Appeals addressed is whether a non-overlapping task-based definition (in accordance with union practice) is required by the Act, or whether the Act permits, indeed requires, categories of federal project workers to mirror real world private project workers.

The Court's decision is informed as it should be by the central purpose of the Act, to provide equality of wages: "At bottom, we are unwilling to read the fairly ambiguous legislative references to a task-based classification system in such a way as to vitiate the clearly expressed congressional purpose to have federal wages mirror those prevailing in the area." Pet. App. 35a.

In examining the language and legislative history of the Act, the Court correctly found that references to non-overlapping classes were the reflection of the practices prevailing in the industry at the time of the Act and its amendments. Thus, the non-use of a helper category during the early years of the Act appropriately re-created in federal projects the situation obtaining in private projects:

> Nevertheless, we do not think Congress intended to bind the Secretary to the job classification existing at that time, but rather merely spoke against a background of the task-based union practice being the prevailing one. [Pet. App. 32a-33a.]

Today, however, the practice in private project construction is to use laborers extensively as helpers in parts of the country. The Secretary so found and the Court analyzed and approved his finding as within his area of special competence. 47 Fed. Reg. 23,647 (May 28, 1982); *See* Pet. App. 38a.

It is clear that the Secretary has the authority to alter regulations to confront changes in the real world, so as to carry out the intent of Congress. *Atchison, T & S.F.R. Co. v. Wichita Bd. of Trade,* 412 U.S. 800, 808 (1972).

The core of Petitioners' concern is enforceability of the new regulations — whether they will provide a means for employers to circumvent the intent of the Act. Pet. 15-16. They argue that the situation which arose under the 1931 language of the statute (". . . shall be not less than the prevailing rate of wages for work of a similar nature. . ."), *i.e.*, the "tendency . . . of wages of the skilled group to descend toward the level of the unskilled group" will reoccur should the regulation be adopted. Pet. 19. This conclusion does not follow necessarily. Contravention of the earlier language was considerably easier, since the lack of *any* reference to classes of laborers was an easier obstacle for contractors to overcome ". . . by hiring mechanics as common laborers, and then assigning them to tasks which fell within the purview of one of the skilled crafts." S. Rep. No. 332, 74th Cong., 1st Sess. 5 (1935).

The Petitioners do not consider that the new regulation will not eliminate the scheme of classification, returning the statute to its 1931 status, since a "helper" falls into a discrete and distinguishable category because he must work under supervision when he does "journeyman's task work"; they do not even address the further guarantee in the regulation that the maximum ratio of helpers to journeymen is two to three, or only 40 percent of the personnel.

Fundamentally, the Petitioners simply disagree with the Secretary's conclusion regarding the degree of enforceability of the new classification. Such a difference of opinion is not ground for invalidating a determination by the

Secretary who has been delegated the appropriate discretion to make such decisions. The Court properly refused to substitute its own or Petitioner's judgment for the articulated, reasonable judgment of the Secretary:

> but we find it difficult to second-guess the Secretary's view that he can catch them. We do not mean that we cannot review the Secretary's decision against a charge that he has effectively abandoned the field. But our deference to his choice is properly near its greatest when his decision turns on the enforceability of various regulatory schemes. He and not the courts can best balance such shifting dynamics as the incentive to violate the rules, the willingness of construction workers and competitors to complain, the ability of his inspection staff to respond and to discover violations, and the effectiveness of sanctions. [Pet. App. 37a.]

II. THE CONSIDERATION BY THE SECRETARY OF PUBLIC POLICY CONCERNS, SUCH AS COST SAVINGS TO THE TAXPAYERS UNDER THE PROPOSED REGULATIONS, WAS APPROPRIATE.

A. The Changes Will Save Considerable Unnecessary Costs.

The Petitioners complain that the Secretary's explanations of the reasons for the proposed changes

> focus on the *cost* aspects of the new regulations and the extent to which regulatory changes will succeed in *lowering* wage rates paid on public construction. . . . But the basic purpose of the Davis-Bacon Act and its related statutes is to ensure fair wages and working conditions for laborers and mechanics employed on federally-funded construction, and not to save money for the Government . . . . [Pet. 14.]

To the contrary, the Secretary primarily related his changes to the intent of the Act, as explained above, which is to ensure *equality* of wages, and *not* to provide *higher* wages in federal projects, as implied by Petitioners. Petitioners say that the Secretary should not consider savings to the taxpayers. Such a position is indefensible: it is surely the responsibility of every federal officer to carry out the law in ways that are most cost-effective and unwasteful of the public treasury.

It is clear that the proposed changes will in fact save considerable unnecessary costs, although the precise savings to be realized can only be estimated. *See Oversight on the Davis-Bacon Act: Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources,* 97th Cong., 1st Sess. (April 28 and 29, 1981) (hereinafter "Hearings").

With regard to the elimination of the thirty percent rule, Lester A. Fettig, former Administrator of the Office of Federal Procurement Policy, and Staff Director of the Subcommittee on Federal Spending Practices, U.S. Senate Committee on Governmental Affairs, noted:

> Further, where else could you find a regulation like the Department of Labor's "30% Rule" which, by mathematical proof, can be shown to drive wage determinations above average prevailing rates?
>
> We can argue over HOW inflationary the effects may be, quibble over the statistics, but let's not waste any more time with Alice in Wonderland logic which would have us believe these regulations are non-inflationary. [Hearings 42.]

The effect of overpaying workers on federal projects through the inclusion of federal project wages on the data base, has an inflationary effect on all construction wages.

As stated by Michael Callas, on behalf of Associated Builders and Contractors:

> We contest the statements of organized labor that once you pay that individual $6 an hour, you can pay them $4 an hour. When you pay them $13 an hour, they are going to be looking for 13 or more. This is the ratchet effect that does affect private construction, so that on every job bid after that, the authorities and the private agencies in our area have to go look for more money. We are 10 or 15 percent over the budget every time. [Hearings 438.]

In fact, it is the existing regulations, not the proposed Final Regulations, which have questionable validity regardless of their duration. The effect of this is stated by Professor Walter E. Williams. Visiting Professor in Economics, George Mason University: "The Secretary of Labor, contrary to the intent of the law, makes wage determinations based on union wages." Hearings 244.

Robert T. Thompson, Chairman of the Labor Relations Committee of the U.S. Chamber of Commerce points out the same concept as follows:

> By legal and proper administrative interpretation, the Department has the discretion to define "prevailing wage" as the range of wages which contractors in a community are offering. But the current regulations provide that when as little as a 30 percent minority earn a figure, then that is a prevailing rate. This formula practically guarantees that where a union represents 30 percent of a local work force, it will have Federal work available. [Hearings 176-177.]

Additionally, the National Society of Professional Engineers noted that:

> Originally, the Act was to keep Federal construction wages even with those paid in private industry. Now, however, the prices are dictated by the Department of Labor and many contractors contend that the wages are equal to union wages and not the "prevailing" wages in a community. The Department of Labor has ruled that a "prevailing" wage is one paid to the exact penny to 30 percent of those people employed in one work category. *"To the penny" pay rates are usually set by union collective bargaining agreements.* [Hearings 567.] (Emphasis added.)

Further support for the Secretary's cost-savings conclusions are found in *Modifying the Davis-Bacon Act: Implications for the Labor Market and the Federal Budget,* Congressional Budget Office (1983) (hereinafter "CBO Study"):

> *Prevailing Wages and Union Rates.* Because union wages in construction are substantially higher than those paid in the nonunion sector, the current definition of prevailing wages potentially raises wages paid on federal construction projects above competitive levels, especially when non-union rates are prevalent in a locality. . . .
>
> . . . The GAO estimated that, of 20 craft determinations studied, wages on 14 would have been 4 percent to 50 percent lower if data from federal projects had not been included. Six determinations, however, would have been 3 percent to 23 percent higher.
>
> The costs to the federal government attributable to Davis-Bacon's effects on wages have been estimated to range from $75 million to $1 billion a year. . . . For example, the DoL estimated that, in 1982, the difference between average wages on Davis-Bacon projects and on private projects

> was 5.3 percent in building construction and 5.4 percent in residential construction – implying a cost to the federal government of $568 million in 1982. This estimate – approximately the mid-point of the range of estimates – is used as part of the total cost impact (3.7 percent) given above. [CBO Study 23]

In summary, the CBO Study finds that eliminating the thirty percent rule will save $500 million in federal outlays for fiscal 1984-1988; and allowing expanded use of helpers in a maximum ratio of two for every three journeymen, will save $1.685 billion in the same period.[4] CBO Study 36.

B. The Redefinition of the "Helper" Category Will Result in Greater Construction Industry Employment Opportunities for Minority and Young Workers.

The refinement of the definition of "helpers" was supported by findings made by the Secretary of Labor after the comment period. Increased recognition of helpers was said to "reflect the wide-spread industry practice of employing semi-skilled workers on construction projects . . . ."[5] 47 Fed. Reg. 23,647 (May 28, 1982). Importantly,

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[4]Due to the dual nature of the proposed regulations regarding helpers, the record does not clearly reflect the cost savings of redefining the term helper, apart from expanding the number of localities in which this definition could be used. Nevertheless the estimated cost savings are substantial. 47 Fed. Reg. 28,649, 23,662 (May 28, 1982).

[5]It is not surprising that in the fifty-two years since the enactment of the Davis-Bacon Act that construction practices would change. What is unusual is that Petitioners would seek to freeze antiquated regulations designed only to perpetuate high construction labor costs for the federal government. The Davis-Bacon Act was passed when the federal government was attempting to counteract depressed employment as a result of the Depression through a substantial construction

the Secretary pointed out that this change would provide more job opportunities for "unskilled and semi-skilled workers (including youth, women and minorities) and encourage their use in a manner which provides training." *Id.* When helpers are used, highly skilled workers can use their skills more effectively, thereby enhancing productivity. Lastly, the changes would allow more contractors to compete for government work. *Id.*

The fundamental problem which the Secretary was trying to correct was the inadvertent effect of existing federal regulations to raise wage levels above those competitive levels prevailing in the community. The social and economic effect of this type of market distortion is multifold. Contractors who are present in the locality who pay lower wage rates prevalent in the community would be precluded from winning federal contracts based on those lower rates. Additionally, since market wage rates convey signals to workers to seek employment where their efforts will be valued most highly, "[l]egislatively imposed minimums interfere with these signals, potentially leading to reduced employment levels, increased unemployment, and shifts in employment in favor of higher-wage workers — such as union labor — who now face artificially slight competition from lower-wage workers." CBO Study 3-4.

The data underlying the Secretary's decision demonstrate that redefining the "helper" category will facilitate job opportunities for those on the entry levels and lower levels of our employment ladder. Informed witnesses with experience with federally-assisted construction agree. Mr. Richard Pepper, a Chicago contractor and vice president

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program. This situation no longer obtains. *See The Davis-Bacon Act Should be Repealed,* General Accounting Office (April 27, 1979) at 1-2.

of the Associated General Contractors of America urged the recognition of "a semiskilled helper classification to be included in the official wage determinations; this would go a long way toward permitting contractors to bid work in accordance with real world employment practices. Recognition of helpers should include the recognition of a training classification for employees not registered in a formal apprenticeship program." Hearings 234.

CONCLUSION

The Petition for a writ of certiorari should not be granted. The Court of Appeals applied the correct standard of review and correctly determined that the Secretary of Labor's proposed regulations are not arbitrary or capricious and are within the ambit of authority delegated to him by Congress. The new regulations will carry out the intent of the Davis-Bacon Act and further important public policies including cost savings and expanded employment of minority, women and youth workers.

Respectfully submitted,

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